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October 4, 2018

VIA E- MAIL

Matthew Pollack, Esq.
Clerk of the Law Court
Maine Supreme Judicial Court
205 Newbury Street
Portland, ME 04101-4125

Re: *Comments Regarding Civil Justice Reform for Maine's Courts*

Dear Mr. Pollack:

The Office of the Attorney General ("OAG") respectfully submits the following comments regarding the proposed civil justice reform to adopt Differentiated Case Management principles as described in the Court's posted summary entitled "Civil Justice Reform for Maine's Courts." We understand that the primary goal of the proposed reforms is to improve access to justice leading to the just, speedy, and inexpensive resolution of civil cases. The OAG supports this goal. The comments below reflect the OAG's perspective on the likely impact that these proposed rule amendments would have on civil practice in state court, based on the OAG's representation of the State of Maine, its agencies, officers, and employees in a wide variety of civil matters.

1. **Proposed M.R. Civ. P. 7(f).** The OAG suggests that the page limits for memoranda in support of or in opposition to motions remain at the current limits (10 pages for non-dispositive motions, 20 pages for dispositive motions, and 7 pages for reply memoranda). In our view, the current limits work well, and 20 pages are needed in most of our cases in support of a dispositive motion. Cases against the State of Maine often involve multiple defendants (entities and individuals) and multiple causes of action. Defense of State entities and officials often involves issues of immunity under the Maine Tort Claims Act, sovereign immunity, and absolute or qualified immunity in civil rights actions. Sovereign immunity provides state officials with immunity from trial, not just immunity from liability at the end of the case. Based upon our experience with these cases, the proposed reduced page limits (7 pages for non-dispositive motions, 14 pages for dispositive motions, and 5 pages for reply memos) will not be sufficient in many of our cases, and we would more often than not need to seek leave of court to enlarge the page limit, creating more work for the Court, clerks, and the OAG.

2. **Proposed M.R. Civ. P. 16.** The OAG suggests that civil rights claims (under either federal or state law), claims brought under the Maine Tort Claims Act, and employment claims (under either federal or state law) be assigned to Track C. Lawsuits against the State and state officials involving these claims are generally complex due to the factual and legal issues implicated, the large number of defendants, one or more immunity issues, and/or the need for fairly extensive discovery and case management.

   In addition, we frequently see independent claims under 42 U.S.C. § 1983 joined with claims brought under M.R. Civ. P. 80C. Under the current proposal, Rule 80C cases are automatically assigned to Track A. We suggest that when an independent claim is joined with a Rule 80C claim, the assignment of the case to a track be deferred until after the Court determines the future course of proceedings in accordance with M.R. Civ. P. 80C(i).

   In addition, we would recommend that the language "serious and legitimate" be deleted from the proposed language in M.R. Civ. P. 16(e)(2)(C)(vi) and 16(e)(3)(B)(vi) as unnecessary. Any motion filed with the Court is subject to the requirements of Rule 11, and this proposed language is unnecessary.

3. **Proposed M.R. Civ. P. 16A.** The proposal establishes a 5-page limit for pretrial memoranda. Currently there is no page limit in the rules. Based upon our experience and the type of cases we handle, 5 pages would not be adequate to cover all of the required information to be included in a pretrial memorandum that would be of assistance to the Court. This is especially true in multi-defendant, multiple count lawsuits, with numerous factual and legal issues (as described above). If a page limit is deemed necessary, the OAG would suggest a limit of 10 pages.

4. **Proposed M.R. Civ. P. 16B(h)(1).** In the event settlement is reached at an ADR conference, the proposal requires the plaintiff to file a proposed order that includes all of the terms of the settlement. This requirement should be deleted as most parties would object to the terms of the settlement becoming part of the public Court record.

5. **Proposed M.R. Civ. P. 30.** For Track C cases, the proposal maintains the current presumptive cap on the number of depositions at 5. As explained above, the OAG recommends that civil rights claims (under either federal or state law), tort claims under the Maine Tort Claims Act, and employment claims (under either federal or state law) be assigned to Track C. If that suggestion is adopted, the proposed presumptive limit of 5 depositions would be adequate. The proposed amendment to Rule 30 would reduce the length of each deposition from 8 hours to 6. In our experience, in many cases, the 8-hour limit is necessary. It is often difficult to arrange for a conference with a judicial officer during a deposition if it appears that a deposition will take longer than the limit. We would

suggest that, if a reduction in the length of a deposition is deemed necessary, the Court adopt the 7-hour (1 day) limit adopted in F.R. Civ. P. 30(d)(1).

6. **Proposed M.R. Civ. P. 33.** The proposal reduces the number of interrogatories from 30 to 20 for Track C and to 10 for Track B. In our view, those new limits would not be sufficient to obtain necessary discovery in many of our cases. Based upon our experience and the types of cases we handle, the OAG suggests that the current limit of 30 be maintained for Track C cases and a limit of 20 apply to Track B cases.

7. **Proposed M.R. Civ. P. 34.** The proposal imposes limits on Requests for Production, 25 for Track C, and 20 for Track B. In our view, as with the reduced number of interrogatories, those limits would not be sufficient to obtain necessary discovery in many of our cases. Based upon our experience and the type of cases we handle, the OAG suggests a limit of 30 for Track C cases and a limit of 20 for Track B cases.

8. **Proposed M.R. Civ. P. 40.** A recurring issue in many of our cases is that civil matters are placed on the trial list before the trial court has ruled on a pending motion for summary judgment. In those instances, the OAG is required to file a motion to remove the case from the trial list, which is generally granted, but creates more work for judges, clerks, and the OAG. Moreover, in the meantime, there is unnecessary confusion and time spent on trial preparation in the event that the case proceeds to trial prior to a ruling on the motion for summary judgment. In addition, in many instances, issues on summary judgment relate to sovereign immunity, absolute immunity, and/or qualified immunity, which must be resolved prior to trial and may be appealable on an interlocutory basis. Given the streamlining of summary judgment practice, and the goal of efficiency in the process, the OAG suggests that the following language be added at the end of M.R. Civ. P. 40(b)(1):

> Unless otherwise ordered by the court, no case shall be transferred to the trial list until after the court has ruled on a timely filed motion for summary judgment.

This is the practice in federal court.

9. **Proposed M.R. Civ. P. 56.** The proposal limits the number of asserted facts in a statement of material facts to 50 in Track C cases and 25 in Track B cases. Based upon our experience and the types of cases that we handle, these limits are not feasible or realistic to present a case on summary judgment. As described above, many of our cases involve civil rights claims (under either federal or state law), tort claims under the Maine Tort Claims Act, and employment claims. The complaints in these cases frequently involve multiple counts and multiple parties. There are more than 50 undisputed material facts in such

cases, particularly when each fact is set forth in a separate paragraph as the rule requires. The OAG would need to request an enlargement of these limits in virtually every case.

If some limitation to the statement of facts is deemed necessary, the OAG suggests that the Court consider the current model in federal court, which requires a party intending to move for summary judgment to file with the court within seven days after the close of discovery either a joint motion with a proposed schedule and proposed page limits, estimates of statements of material facts, and deadlines or a notice of intent to move for summary judgment and the need for a pre-filing conference. *See* D. Me. Local R. 56(h).

In addition, proposed amended Rule 56 would significantly alter the page limits for memoranda in support of and in opposition to motions for summary judgment, as well as provide more pages to the moving party than the opposing party. In our experience, the current 20-page limit for both the moving party and the opposing party (with additional pages permitted by leave of court) works well in most cases. In the alternative, we suggest that the page limit for a memorandum in opposition to a motion for summary judgment (M.R. Civ. P. 56(f)(1)) be 28 pages for Track C and 14 pages for Track B (not 14 pages without regard to Track) to conform with the page limits for the memorandum in support of the motion for summary judgment.

The proposal also requires that parties "attach" supporting documents to the statement of material facts. We suggest that the proposal substitute "submit with" in place of "attach" in proposed M.R. Civ. P. 56(e)(2)(B) and 56(f)(2)(B). Attaching supporting documents to the statement of facts would be unwieldy for the parties, the clerks, and the court.

10. **Proposed M.R. Civ. P. 80C.** The OAG suggests that the following language be added to the last sentence of proposed M.R. Civ. P. 80C(i)(2):

    which order shall include Case Track assignment.

See Comment 2, ¶ 2 above regarding proposed M.R. Civ. P. 16.

I hope these comments will be useful to the Court in its review of the Civil Justice Reform for Maine's Courts. If the OAG can be of further assistance, please let me know. Thank you.

Sincerely,

Susan P. Herman

Susan P. Herman
Deputy Attorney General

SPH/lsf

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October 5, 2018

Matthew Pollack
Executive Clerk
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205 Newbury St. #139
Portland, ME 04101-0368

Dear Mr. Pollack:

On behalf of Berman & Simmons, please accept this as our firm's comments on the proposed amendments to the Maine Rules of Civil Procedure. We appreciate this opportunity to comment.

The proposal to implement civil justice reform through proposed amendments is sweeping in nature. It impacts over forty rules and would upend years of settled practice. We support some of the proposed amendments and oppose others. Our overriding concern is that more time is necessary to carefully consider the impact of each of the changes proposed. Given the short time available, we include comments on individual proposed rules below. We also respectfully request that the Supreme Judicial Court extend the comment period to allow further reflection on the effects of these proposed reforms.

Our two most pressing concerns are: (1) the implications of classifying pre-panel medical malpractice cases as Track A cases; and (2) automatic disclosures focused solely on plaintiffs in personal injury cases.

Changes to medical malpractice litigation:

By classifying pre-panel medical malpractice cases as Track A cases, the proposed rules would eliminate pre-panel discovery. This would fundamentally change how medical malpractice cases are litigated in Maine. As the 2009 Advisory Committee's Notes state, because "discovery in the panel proceedings is usable in any later filed civil action, the panel proceedings perform a valuable function in producing the discovery required in a civil action."

By moving the entire discovery process to the post-medical malpractice screening panel period, the proposed rules would greatly extend the time needed for discovery once a complaint has been filed, thereby extending the time a post-panel case remains on the docket. Moving the discovery process to the post-panel stage also undercuts the very purpose of the screening panel process – early resolution of claims following a confidential process. Once we remove the ability to fully conduct discovery from the pre-panel process, it is far less likely that any party will have the evidence necessary to accurately evaluate the case for settlement.

We understand that pre-panel medical malpractice cases were likely grouped with Track A cases because Maine Rule of Civil Procedure 80M outlines specific procedural rules for the panel system. Although the Panel Chair is responsible for setting a scheduling order for written discovery and depositions under Rule 80M(c), Rule 80M only supersedes the general provisions of the civil rules when it explicitly provides so. M.R. Civ. P. 80M(a). Thus, the general discovery rules regarding depositions, interrogatories and requests for production of documents apply to pre-panel medical malpractice cases.

This problem could be remedied while leaving pre-panel medical malpractice cases on Track A by including a provision such as: **"For the purposes of Rules 30, 33, and 34, pre-panel medical malpractice cases shall be classified Track C cases. In addition, pursuant to the Maine Health Security Act, the Panel Chair has discretion to permit additional reasonable discovery."**

Automatic disclosures:

Proposed Rule 26A exceeds Federal Rule 26's requirements for automatic disclosure. Federal Rule 26 neither singles out a particular class of cases nor imposes automatic disclosures on one party only. By contrast, the proposed changes impose significant one-sided requirements for plaintiffs in personal injury cases.

To be clear, we do not oppose the automatic disclosure requirements identical to those in Federal Rule 26. We do oppose the 'Special Requirements for Claims of Bodily Injury and/or Emotional Distress' in proposed Rule 26A(a)(2), which unfairly imposes automatic disclosure requirements on one party only. If plaintiffs are required to disclose additional categories of documents in personal injury cases as an initial disclosure without a written discovery request from the defendant, yet both parties are subject to the same limits on written discovery requests in Track B and Track C cases, this effectively provides defendants with more discovery of the plaintiff. Such disparate treatment of opposing parties in the same case provides an unfair advantage to defendants and raises significant constitutional concerns.

We propose that to the extent additional disclosures are imposed on plaintiffs in personal injury cases, defendants should also be required to produce documents routinely requested of them in such cases. Examples include:

- all documents proving or supporting affirmative defenses pled in your case;
- all video surveillance footage of the scene of an accident or injury, including footage prior to and after the injury;
- any incident report relating to the occurrence;
- in a motor vehicle case, all invoices, estimates, letters, or other documents concerning repairs or maintenance of the vehicle in the six months leading up to the crash; and
- a list of all other lawsuits or claims made against the defendant for incidents similar to the occurrence at issue in the case.

The requirement for a personal injury plaintiff to list all health care providers, hospitals, and medical practices where he or she has been seen or treated for ten years prior to the date of the occurrence, and to produce all medical records for examination or treatment during that time, is oppressive and overly burdensome. First, plaintiffs are required to produce information and

medical records for unrelated treatment or seek judicial intervention through a motion for protection from disclosure. Under current practice, counsel for the parties routinely reach agreement on the categories of treatment or records that are completely unrelated, without the need for judicial intervention. The rules should incorporate and encourage this cooperation. The rules should also incorporate a simple means for a party to withhold documents from initial disclosure based on an objection and to inform opposing counsel who can attempt to resolve the discovery dispute with the withholding party and decide whether to seek court intervention.

The timeline within which plaintiffs must file a motion for protection from disclosure of unrelated medical care during the course of litigation is unreasonable. As drafted, it requires disclosure within fourteen days after a plaintiff receives unrelated medical treatment occurring after the date of initial disclosures. Many clients receive significant unrelated medical treatment over the course of litigation, and will not always be able to notify their attorney so soon after each separate instance of treatment. The requirement for a separate motion for protection from disclosure for each instance of medical treatment occurring after the initial disclosures, would be burdensome for plaintiff's counsel and for the court, generating numerous motions over the course of litigation.

The ten year 'look back' period for medical treatment and records is potentially unfair, overly burdensome, and will be disproportional to the needs of the case in many cases. Often parties in personal injury cases agree to production of medical records for five years prior to the date of occurrence. Many judges on the Superior Court bench order production of five years of medical records when deciding a discovery dispute.

We propose that if plaintiffs are required to provide a list and produce medical records for all medical treatment as an automatic disclosure, the rule should require a list of treatment and production of medical records for all health care professionals, hospitals, other medical institutions and practices where plaintiff received examinations or treatment *reasonably related* to the claimed injuries during the *five* years prior to the occurrence, as well as between the occurrence and the date of the disclosures. Further, to the extent that any defendant presents a defense based in part or in whole on his or her health (i.e. a "sudden medical emergency" defense), such defendant should be required to produce a comparable breadth of information and medical records as an automatic disclosure.

Additionally, Proposed Rule 26A(a)(2) applies to 'a party claiming . . . damages.' Read literally, the proposal could require parties who are suing in a representative capacity, such as personal representatives of an estate, to disclose their own medical and other records, rather than the records of the person who actually suffered the relevant injury. The rule should be clarified to avoid this unintended consequence.

We also propose that if plaintiffs are required to produce a list of all other lawsuits, injury claims, disability claims, or workers compensation claims for 10 years prior as an automatic disclosure in personal injury cases, the list of lawsuits be restricted to personal injury lawsuits. Other types of lawsuits, for instance breach of contract claims, are not relevant to any issue in a personal injury lawsuit. To ensure that plaintiffs and defendants are treated equally under the rules, defendants should also be required to produce a list of all other lawsuits or claims made against the defendant for incidents similar to the occurrence at issue in the suit.

The Special Requirements for Claims of Bodily Injury and/or Emotional Distress impose heightened burdens targeted to personal injury plaintiffs, but without any legislative lawmaking process. The judiciary should be wary of using the authority of the State to impose unreasonably burdensome, intrusive, humiliating, or harassing requirements on civil litigants who have a constitutional right to seek remedies for very real and serious injuries in court. This is especially true when the production requirements include no mechanism for the plaintiff to contest production on the basis of privilege or work product doctrine protection.

Proposed Rule 3

When a plaintiff elects to commence via service (followed by filing), as per proposed Rule 3(a), the proposed rule reduces the deadline for filing the Complaint (and civil case information sheet) after completion of service from 20 to 14 days. We oppose this reduction. Plaintiffs' attorneys who commence an action via service by and large file the Complaint with the court immediately upon completion of service. It is in the multi-defendant context that plaintiffs' counsel will wait to file until all defendants have been served, as it is quite common that one or more defendants are not served until 14-20 days after the first served defendant. By shortening the filing deadline, the proposed Rule will unintentionally create additional delay and unnecessary burden on the judiciary as the frequency of plaintiff requests for additional time will increase.

When a plaintiff elects to commence via filing (followed by service), as per proposed Rule 3(b), the proposed rule reduces the deadline for filing the return of service from 90 to 70 days after the filing of the Complaint (and civil case information sheet). We oppose this reduction. Currently, plaintiffs' counsel rarely choose to wait more than 70 days to file a Complaint once it has been served on a defendant, and only do so in difficult circumstances where the extra 20 days are highly important and even help to streamline the litigation process. If a defendant is evading service or if plaintiff is having difficulty locating the defendant, the last 20 days of the current 90-day deadline are often where service is ultimately effectuated. Moreover, when plaintiffs' counsel is hired just before the applicable statute of limitations is set to expire, he or she may file a Complaint to preserve the claim and will then withhold service until he or she has more fully investigated the facts in order to assess the claim's viability. If the claim lacks merit, the plaintiff can then dismiss the action before the defendant has even been served. Therefore, the proposed 70-day filing deadline, in contrast to the current 90 days, does not accommodate the due diligence that is often necessary before plaintiffs' counsel can confidently advise his or her client regarding dismissal of the claim, and will therefore result in the litigation of claims that the current 90-day deadline serves to eliminate.

Proposed Rule 15

Current Rule 15(a) rule provides, "A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court orders otherwise." The proposed rule reduces the 10 days to 7. Amendments to pleadings often dramatically alter the facts, scope and dynamics of a case, and careful reflection should therefore be encouraged before a party responds to the Amendment. Thus, it would be more appropriate to increase the current 10 days to

14 – in order to be consistent in calculating deadlines in seven-day increments - rather than reduce it to a mere 7 days.

Proposed Rule 16

We agree generally with the assignment of cases into different case management tracks, but oppose specific aspects of the proposed Rule. As discussed above in more detail, we have concerns about the effect of the proposed Rule in medical malpractice screening panel cases.

We also have concerns that Track B appears to presumptively include all personal injury cases except products liability and medical malpractice claims. Personal injury cases range from the routine—two car intersectional collisions—to highly complex—multi-party wrongful death or catastrophic injury cases with multiple experts. The clerk assigning a case to a track will have little information about the case. Given the strict discovery limits associated with Track B cases, court involvement will increase as parties will request a conference with the judge under proposed Rule 16(c) to change the track.

We oppose the deadline of six months from the date of the answer to complete discovery in Track B cases. An unrealistically short deadline for discovery places the plaintiff at an unfair disadvantage because the plaintiff bears the burden of proof yet typically lacks access to the key information necessary to meet that burden, without discovery. It provides defendants with a procedural advantage. Foreshortened discovery decreases the likelihood of settling claims before trial. Parties are more successful in resolving cases when they have more information with which to assess their risk.

The requirement to complete discovery within six months after discovery is filed is unrealistic given the logistical factors involved in discovery, many factors being out of the control of parties and their attorneys.

For post-panel medical malpractice cases falling in Track C, eight months of additional discovery is unnecessary after the discovery allowed prior to panel hearing under the proposed modification discussed at the beginning of this comment. We propose that four months of discovery be allowed for medical malpractice cases falling in Track C that have proceeded through the panel phase.

Finally, the procedure for seeking modification of the scheduling order will itself be less efficient. Parties must use the method outlined in proposed Rule 7(b)(1), which requires the court to schedule a conference with all the attorneys. This procedure places considerable burden on the court.

Proposed Rule 16A

Proposed Rule 16A makes pretrial conferences mandatory. (The current rule states the court "*may* also schedule a conference"; the proposed rule states "a pretrial conference *shall* be held in each Track B and Track C case" unless exempted by the court for good cause shown.). Whereas the current rule provides for an oral discussion with the court at the pretrial conference, the proposed rule requires a pretrial memorandum in all Track B cases. In all Track C cases, it requires either a pretrial memorandum or a joint pretrial statement.

The pretrial memorandum and joint pretrial statement require parties to describe in writing, with case citations, their position on contested evidentiary and legal issues, even when motions are pending on those very topics. This creates duplication of effort by the parties' drafting, and the judge's reading, of these submissions. In current practice, judges typically ask parties at the pretrial conference to briefly state the contested legal and evidentiary issues that are either the topic of pending motions, or foreseen. There is no need to mandate a formal written submission in all cases.

Additionally, the rule directs judges in Track C cases to "consider" the "elimination of unsupported claims or defenses." Currently, the motion to dismiss under Rule 12(b)(6), the motion for summary judgment under Rule 56, and the motion for judgment as a matter of law under Rule 50, all provide opportunities for parties to raise (and defend against) dismissal of claims or defenses for a failure of legal or factual support. These rules provide clarity as to the standards and procedure for dismissal of claims or defenses and have been further elaborated and clarified through a body of judicially created case law. Proposed Rule 16A is ambiguous as to the standard to be applied when a judge "considers" "eliminating" claims or defenses. It is ambiguous as to the procedure to be followed, including whether the issue must be raised by motion and whether the judge can *sua sponte* 'eliminate' a claim or defense. This lack of clarity and lack of procedural safeguards raise serious constitutional issues.

Proposed Rule 16B

Under the current Rules, plaintiffs are required to promptly report the fact of a settlement to the Court. Courts then issue an order dismissing the case, without any reference to a settlement in the order. This proposed Rule goes much further, requiring plaintiffs to report "all of the terms of the settlement" to the court in a proposed order, when reporting the fact of a settlement. Presumably, the court's order entered on the docket to dismiss the case would then include the fact of a settlement and its terms.

We oppose this requirement. Frequently, confidentiality regarding a settlement and its terms is an underlying factor driving settlement. It is often a negotiated term of the settlement itself. Including the fact of settlement and its terms in the court's order makes this information a matter of public record. This is a very significant departure from current practice and is not necessary to the goal of ensuring that courts are timely informed of a settlement.

We foresee significantly fewer settlements if the parties are unable to negotiate confidentiality as a term of settlement, particularly for medical malpractice suits in the confidential pre-litigation panel hearing phase. We are concerned that personal injury plaintiffs, who can have less financial education and experience handling large sums of money, will be exploited by unscrupulous businesses and individuals if the amount of a settlement becomes a matter of public record.

Proposed Rule 16B shortens the deadline for ADR to 91 days after the entry of a scheduling order from 120 days and eliminates the ability of parties to extend that time period by agreement. We oppose this provision. Experience shows that mediation is more likely to be successful when both parties have the information they need to assess their risks. ADR conducted within the first three

months after a scheduling order is less likely to succeed for that reason. Requests to the court for additional time will become routine, increasing the burden on courts.

Proposed Rule 26B

Rule 26 provides that discovery limits on the number of interrogatories, requests for production, requests for admission, and depositions for parties in Track B and Track C cases are presumptive limits and cannot be exceeded unless a party establishes that additional discovery is proportional to the needs of the case. The proportionality standard articulated in Proposed Rule 26 mirrors that in Federal Rule 26, but with an important distinction. In federal practice, parties invoke the proportionality standard to ***limit*** the ***scope*** of another party's discovery request, for instance arguing that production of a defendant's maintenance logs should be limited to only one year prior to the incident, rather than the five years requested. Under proposed Rule 26B, plaintiffs invoke the proportionality rule to ***expand*** the ***number*** of discovery requests or depositions beyond a presumptive limit. We propose that if the proportionality standard is adopted, it must apply equally to the ***scope*** of all discovery, as in Federal Rule 26. This includes, but is not limited to, the plaintiff's production of the additional records required in the Special Requirements for Claims of Bodily Injuries and Emotional Distress.

Under the federal rules, disagreements over proportionality can be resolved by the parties without judicial intervention. Under Proposed rule 26B, judicial intervention is always required when the plaintiff seeks to establish that expanded discovery is proportional to the needs of the case. In this way, proposed Rule 26B follows a theme present throughout the proposed rules—the theme of increased judicial oversight and control of discovery issues that the parties have until now often resolved without judicial intervention. The increased burden on the judiciary will result in further delays in the litigation of cases.

Proposed Rule 30

Proposed Rule 30 eliminates depositions in Track A cases without prior authorization of a court order. If medical malpractice screening panel cases remain on Track A and there is no provision to reclassify them for the purposes of Rule 30, we oppose this rule. Complex medical malpractice cases may involve multiple defendants, multiple party witnesses, and multiple expert witnesses. Requesting prior authorization before each deposition would create a burdensome process. Going to the screening panel without deposing witnesses first would create a much less effective panel hearing process.

Proposed Rule 33

We oppose the proposal in Proposed Rule 33 that would eliminate interrogatories altogether for Track A cases and limit them to 20 for Track C cases. As stated above, we are advocating for a provision that would require pre-panel medical malpractice cases to be categorized as Track C for the purpose of Rule 33.

Limiting interrogatories to 20 in the most complex cases is a needless limitation on a valuable discovery tool. Our experience has been that Maine attorneys are able to self-regulate the use of

interrogatories. A simple medical malpractice or personal injury case may not necessarily require more than twenty interrogatories. But when complex issues arise, such as affirmative defenses, immunity issues, vicarious liability, etc., interrogatories can be an effective tool to elicit information in an efficient and cost-effective manner.

Proposed Rule 34

We oppose the proposal in Rule 34 that would eliminate requests for production of documents altogether for Track A cases and limit them to 25 for Track C cases. As stated above, we are advocating for medical malpractice screening panel cases to be categorized as Track C for the purposes of Rule 34.

Limiting requests for production of documents to 25 in all cases is a needless limitation on a valuable discovery tool. Again, our experience has been that Maine attorneys have been self-regulating how many requests for production of documents they propound. In a simple case, 25 or fewer requests is reasonable. In more complicated cases, 25 is an arbitrarily low number. Attorneys regularly take depositions in which a witness refers to a specific, previously undisclosed document. Following the deposition – but long after propounding initial requests for production of documents – a supplemental request is propounded for the new documents. Limiting parties to 25 requests would prevent attorneys from following up on documents that appear to be reasonably calculated to lead to the discovery of admissible evidence.

Proposed Rule 36

We oppose the proposal in Proposed Rule 36 that requires prior approval of specific requests from the court in order to promulgate any request for admission (except those asking whether a document is genuine). Requests for admission can elicit valuable discovery while saving court and trial time. They are generally used to eliminate issues at trial or confirm key facts prior to filing a motion. Frequently, a simple request for admission is the most efficient, least expensive method to establish key facts. By requiring prior approval by the court, this change will place an increased burden on judicial resources.

Proposed Rule 38

We oppose the proposal in Proposed Rule 38(b)(2) that a party bringing a claim and demanding a jury trial must pay the jury fee within 28 days after the filing of an answer. We do not oppose any proposal that jury demands themselves be made at an earlier stage in litigation. However, we believe that requiring jury fee payment at this same early stage would unnecessarily increase costs in the substantial number of cases that do not proceed to trial. Under current practice, parties often do not make jury demands and incur jury fees until there has been substantial opportunity for settlement negotiations, including ADR. This ensures that by the time a party makes a jury demand and pays the jury fee, the likelihood of proceeding to trial is relatively high. By requiring fee payment at an early stage in litigation, when the likelihood of proceeding to trial is relatively low, Proposed Rule 38(b)(2) would increase the number of cases in which a party incurs the cost of a jury fee only to settle before trial.

Proposed Rule 40

We oppose the proposal in Proposed Rule 40(b) that would allow judges and justices, in their discretion, to hold trials in court locations other than where a matter originated. This proposal impinges on a plaintiff's choice of venue and right to file in their home county, especially in our geographically large state where different court locations may be many hours apart. We agree that changing trial location is a tool that should be used more frequently to facilitate the prompt scheduling of trial. However, changes in trial location should only occur with the agreement of the plaintiff.

Proposed Rule 56

We oppose the proposal in Proposed Rule 56(c)(1) that summary judgment motions in Track B cases be filed within 14 days after the discovery deadline. In our experience, parties often exchange information that may be critical to summary judgment motions (or to the decision whether to move for summary judgment) up until the close of discovery. We believe that 14 days is too short a period in which to thoughtfully draft motions for summary judgment, and suggest that the deadlines in both Track B and C cases be set at 28 days after the discovery deadline.

Proposed Rules 59, 62, 68, 76D, 76F, 76G, 76H

We support the proposed amendments to these rules. Changing the deadlines as proposed is a modest means to simplify scheduling for both the courts and parties.

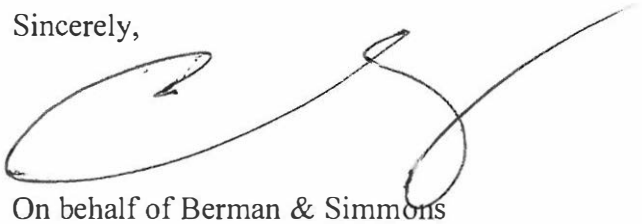
Proposed Rule 76C

We oppose the proposed amendment to subdivision (a), which would eliminate the plaintiff's right to remove an action from District Court to Superior Court for a jury trial. This proposed amendment is particularly harmful to the interests of *pro se* plaintiffs who might not, at the time of filing the cause of action, be aware of the right to a jury trial and how the choice of court affects that right.

To the extent the motivation behind the proposed amendment is to minimize opportunity for intentional delay or stalling, we would observe that plaintiffs typically desire swift action on their claims. In our experience, they want relief as promptly as possible and lack incentives to delay. Thus, the notion of a plaintiff who files in District Court with the present intent to later remove to Superior Court strikes us as unlikely to materialize in practice. However, a plaintiff might, as a case progresses in the District Court, realize that the case warrants a Superior Court venue. This option should be preserved.

We appreciate your time and attention given to this matter. Please feel free to contact me if you have any questions regarding these comments.

Sincerely,



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VIA ELECTRONIC MAIL

October 5, 2018

Matthew Pollack, Executive Clerk
Maine Supreme Judicial Court
205 Newbury Street, Room 139
Portland, ME 04101-4125

Re: Proposed Civil Justice Reform

Dear Matt:

Please accept these written comments on behalf of Bernstein Shur's Litigation Practice Group concerning the proposed amendments to the Rules of Civil Procedure that were published by the Law Court on September 5, 2018. We are grateful for the opportunity to share our views on these important proposed changes, which would have a wide-ranging impact on civil litigation in our state.

General Comments

We support the Court's desire to apply Differentiated Case Management ("DCM") more broadly to Maine's civil justice system. The experience of the Business and Consumer Court Docket, which has been in place now for ten years, has proven that individualized case management works.

DCM reflects the importance of two basic concepts: First, the civil courts exist for the purpose of serving litigants – primarily citizens of Maine, but others as well – by allowing them to participate in a justice system that applies the law on a fair and equal basis. Second, although the law is applied the same to everyone, every litigant and every case are by definition unique. As the Court recognized in its Civil Justice Reform Summary, "one-size-fits-all standard scheduling with limited case management does not work." This is the principle that underpins DCM and makes it worthwhile as an administrative goal.

With this as a backdrop, we respectfully have concerns that the redrafted Civil Rules presented for comment by the Law Court move too quickly and go beyond what is necessary to implement effective individualized case management. For most lawyers in practice today, these are the most

sweeping proposed changes to the Civil Rules during their careers, and they have been put forth by the Court on relatively short notice. We respectfully suggest it would be wise to take more time to consider them, including by providing additional time for comment.

In terms of scope, the proposed changes go beyond just creating a new system for individualized case management. They also would reshape the process of litigating a typical case significantly by imposing compressed procedural timeframes, shortening and curtailing the discovery process, restricting the length of written motions, curtailing summary judgment practice, and restricting the abilities of parties to obtain schedule enlargements. These changes would create a civil justice system different from the one that exists today – perhaps more efficient, but certainly also more strict and burdensome for litigants and their counsel.

While no one can predict the future, we respectfully believe this stricter philosophy may produce unintended effects that the Court should consider. Based on our experiences, a stricter litigation system likely would lead to stricter practices and a decline in civility among counsel, who will have less room to be forgiving with each other. It also may lead to a narrowing of the litigation bar based on a perception that litigation under the new rules would be the province only of very specialized practitioners. Newer lawyers may be hesitant to enter litigation as a specialty, as will those who perceive that their personal and family situations may not permit them to meet the demands of operating on an inflexible and demanding schedule. Bigger firms probably will be better able to adapt than smaller firms and solo practitioners.

Although the Court in its Summary predicts that the proposed changes would "create an efficient and straightforward process for civil cases," we anticipate they will increase the degree of difficulty of practice enough – particularly insofar as they will compress the overall timeframe within which the steps to litigate a case must be completed – that lawyers will handle fewer cases at any given time. Thus, we respectfully disagree with the Court's assessment, as expressed in the Summary, that two of the benefits of the system as proposed will be to increase civil case filings as well as the number of litigants represented by an attorney.

In summary, although we embrace the concept of DCM and believe in its benefits, what stands out in these proposed rule changes is not DCM so much as a stricter procedural regime that will make it harder for parties to litigate. We respectfully suggest that the benefits of DCM can be accomplished, and indeed enhanced, without also making aggressive changes to the way we now litigate in Maine.

Comments on Specific Proposed Rules

- Rule 7(b)(1): Requests for uncontested scheduling order changes. Proposed Rule 7(b)(1) establishes a procedure for parties to bring several types of requests to the Trial Court in lieu of more formal motion practice. The matters covered by the proposed rule include any scheduling order modifications sought by a party during the course of a case. *See* proposed Rule 16(d)(4). It is unclear how this process would work with respect to uncontested or joint efforts to enlarge scheduling order deadlines. Proposed Rule 7(b)(1)(A) requires parties to confer in a "good faith

effort to resolve by agreement any issues in dispute." Proposed Rule 7(b)(1)(B) goes on to provide that if "the dispute is not resolved by agreement" the requesting party shall request a conference with the Trial Court by letter. Under proposed Rule 7(b)(1)(C), the clerk then shall schedule a conference among the court and counsel to discuss the issues in question, to be followed by the court's issuance of an order as provided in proposed Rule 7(b)(1)(D).

Under current rules and practices, uncontested or joint motions by counsel to enlarge scheduling order deadlines are submitted to the Trial Court and either granted or denied by it in the exercise of its discretion, typically without a conference, but the court can and will confer with counsel if it sees the need to do so. Proposed Rule 7(b)(1), read in conjunction with proposed Rule 16(d)(4), appears to require that counsel, even if they agree on a proposed schedule change, would be required to seek and participate in a conference with the Trial Court in every instance. We respectfully believe this would impose an unnecessary burden on counsel and the court, and on clients in the form of increased legal fees. The Trial Court already has the tools to review enlargement requests and either grant or deny them as it sees fit, taking into account the circumstances of the case. The proposed rule acts as a restriction on the court's discretion to manage individual case schedules, which is contrary to the objectives of DCM.

- Rule 7(f): Page Limits. Proposed Rule 7(f) reduces the page limit (1) for memoranda of law in support of or in opposition to non-dispositive motions, from 10 to 7 pages, (2) for memoranda in support of or in opposition to motions to dismiss, motions for judgment on the pleadings, and motions for injunctive relief, from 20 to 14 pages, and (3) for reply memoranda (other than with respect to motions for summary judgment), from 7 to 5 pages. We respectfully submit these page limit reductions are unnecessary.

- Rule 16: Clarification of the Civil Case Information Sheet as it pertains to the identification of Track B and Track C cases. Proposed Rule 16(a) provides that the list of cases falling within Track A and the case types falling within Track B or Track C are provided on the Civil Case Information Sheet that must be completed and filed by plaintiffs with the complaint. With regard to the types of cases listed under Track B or Track C, the Civil Case Information Sheet appears to identify three categories of "presumptive" Track C cases: (1) "Business Organization Disputes"; (2) Professional Malpractice Claims; and (3) Shareholder Derivative Actions. However, the text of proposed Rule 16(a)(3) (entitled "Track C – Complex Track") identifies a longer list of presumptive Track C cases, including the following case types that are "presumptively complex": "business organization disputes, product liability claims, professional malpractice claims, complex building construction and/or design claims and shareholder derivative actions." For purposes of clarity, the list of presumptive Track C cases on the Civil Case Information Sheet should be made consistent with the list of presumptive Track C cases in proposed Rule 16(a)(3). In addition, the phrase "business organization disputes" should be clarified as to whether it encompasses any dispute involving a business organization, or rather those cases in which some aspect of the subject of business organization is at issue.

- Rule 16(d)(4): Modification of Scheduling Orders. Proposed Rule 16(d)(4) provides that a scheduling order may be modified "only upon a demonstration of good cause for not being able to

adhere to the prior schedule established by the court." Presumably, this change is intended to restrict the discretion Trial Courts now have under Rule 6(b) to grant enlargements of time "for cause shown." We respectfully believe this change is unnecessary. The Trial Court is in the best position to evaluate how a schedule enlargement may impact a case and has discretion under the existing rule to make that call. Restricting that discretion is contrary to the objectives of DCM.

- Rule 16B(a): Alternative dispute resolution; timing. Proposed Rule 16B(1) provides that the ADR conference in a Track B or Track C case must be completed within 91 days after the date of the Trial Court's entry of the scheduling order. It has been our experience that ADR conferences are most productive when parties have taken enough discovery from each other to have well-developed understandings of each other's claims and defenses. In most cases, however, we believe that less than 90 days will not be enough time to complete discovery for the purposes of having a meaningful ADR conference – this timeframe is just too short. The effect likely will be to hamper ADR efforts. The default deadline for completing ADR could be set later in the schedule without lengthening the overall time to completion of the case.

- Rule 16B(h): Alternative dispute resolution; ADR conference report. Proposed Rule 16B(h) provides that upon the successful completion of an ADR Conference, the plaintiff shall provide a report and proposed order to the Trial Court that "includes all the terms of the settlement." We respectfully urge the removal of this requirement, as it runs counter to the reality that many parties – both plaintiffs and defendants – bargain for and desire confidentiality as part of their settlement agreements. This proposed change would be a fundamental shift in settlement practice that may discourage parties from settling their disputes.

- Rule 26A: Automatic Initial Disclosures; medical records. Proposed Rules 26A(a)(2)(B) and (C) require a plaintiff in cases involving a claim of bodily injury and/or emotional distress to include with his or her Initial Disclosures medical records going back ten years before the date of the occurrence underlying the action, as well as a list of all health care professionals or practices the plaintiff has seen in that same ten year timeframe. We respectfully suggest that the ten-year upfront requirement in every case is excessive, would add unnecessary costs, and is not in keeping with the usual practices and standards in these cases. A five-year requirement would be sufficient in a typical case and would not deprive the opposing party of the opportunity to pursue older records if warranted.

- Rule 26A: Automatic Initial Disclosures; timing. Proposed Rules 26A(b)(1) and (2) provide the deadlines for parties to exchange their Initial Disclosures. For Track B cases, they provide that the plaintiff shall serve its disclosure within 7 days after the defendant has responded to the complaint, and the defendant would serve its disclosures within 7 days following the disclosures by the plaintiff. We respectfully submit this timing is unnecessarily short and will create practical difficulties for compliance. Also, it is unclear why the parties would not be required to make their disclosures simultaneously, as happens under current federal practice. Staggering the timing as proposed would provide an unnecessary informational advantage to defendants. In Track C cases, the plaintiff would provide its disclosures within 14 days after the defendant has responded to the complaint, and the defendant would serve its disclosure within 14 days thereafter. As with the

disclosures in Track B cases, the Track C disclosures would operate more fairly if they were simultaneous, and their deadlines seem unrealistically short.

- Rule 26B(b)(7)(A): Discovery deadline in Track B cases. Proposed Rule 26B(b)(7)(A) provides that the deadline to complete discovery in Track B cases shall be not more than 6 months. We respectfully suggest this is too short a discovery period to impose across-the-board in Track B cases. While some cases in Track B surely would merit a discovery period of 6 months or less, that determination properly should be made by the presiding Justice, consistent with the principles of Differentiated Case Management. We also believe that a 6 month discovery period in most civil cases will be difficult to implement and will place a practical burden on the resources of parties and the courts that will be out of proportion to its perceived benefits.

- Rule 30(b)(1): Presumptive limit on depositions in Track B cases. Proposed Rule 30(b)(1) provides for a limit of 4 depositions per party in Track B cases. We respectfully suggest it is not necessary to deviate from the current presumptive limit of 5 depositions per party in Rule 30(a), which in our experience is not abused by litigants. Depositions are a crucial discovery tool that should not be limited without a strong justification for doing so.

- Rule 30(e)(2): Time limit for depositions. Proposed Rule 30(e)(2) provides that the time limit for a deposition shall not exceed 6 hours. We respectfully contend the current limit of 8 hours should be retained. Depositions are a crucial discovery tool. Although depositions of 8 hours' durations are unusual, parties should be given the flexibility to conduct them for that amount of time in those instances in which it is necessary to do so. If a party lengthens a deposition in bad faith or so as to harass a witness, Rule 30(d)(3) provides a mechanism for the Trial Court to address that problem.

- Rule 33(b): Presumptive limits on Interrogatories. Proposed Rules 33(b)(1) and (2) provide presumptive limits of 10 interrogatories per party in Track B cases, and 20 interrogatories per party in Track C cases. We respectfully contend these limits are unnecessarily low, particularly with regard to the Track B limit of 10 interrogatories. For parties that wish to obtain an opponent's sworn responses to questions without incurring the costs of a deposition, interrogatories can be a valuable and cost-effective evidentiary tool. The proposed reduction is too drastic.

- Rule 34(b): Presumptive limits on Document Requests. Proposed Rules 34(b)(1) and (2) provide presumptive limits of 15 document requests per party in Track B cases, and 25 document requests per party in Track C cases. We respectfully submit these proposed limits are unnecessarily low and represent too deep a cut in the existing limits. Documentary evidence plays a critical role in most cases, and counsel are obliged to be thorough and careful in pursuing documents in an adversarial setting. Thorough document production is an essential aspect of a full and open discovery process, which in turn enables parties to understand their claims and defenses more fully and to proceed with confidence in refining their positions. We respectfully contend that the expected benefits from this proposed change would be outweighed by the harm it would do to the ability of parties to develop their cases properly.

- Rule 36: Limitations on Requests for Admissions. Proposed Rule 36 would make requests for admissions available as of right only with respect to the genuineness of any relevant documents. Court authorization via the request process contained in Rule 7(b)(1) would be necessary for a party to serve a request for admission on any other matter. We respectfully disagree with this proposed change as overly restrictive. Of the discovery tools available to parties, requests for admissions tend to be used the least, but they can play a unique and efficient role in narrowing the issues in a case in a way that direct requests for a stipulation cannot. We believe the proposed rule will curtail the use and utility of a valuable discovery tool without providing sufficient corresponding benefits.

- Rule 39(b): Court's discretion to order a jury trial in the absence of a demand. Proposed Rule 39(b) would eliminate the discretion of the Trial Court to order a jury trial on any or all issues in a case even if neither party has made a jury trial demand. We respectfully suggest it would be more consistent with the principles of DCM to maintain the discretion of the Trial Court that presently exists.

- Rule 56(c): Timing of summary judgment motions for Track B cases. Proposed Rule 56(c) provides that a summary judgment motion in a Track B case must be filed no later than 14 days after the discovery deadline without prior approval of the Trial Court. We respectfully submit this timeframe – even taking into account the reduced page limits and limits on statements of undisputed material facts set forth in other parts of proposed Rule 56 – is too short. Even in cases that may not meet the definition of "complex" for purposes of assignment by the court to Track C, summary judgment motions necessarily require parties to compile and synthesize a significant amount of evidence. They also require them to analyze legal concepts carefully and present them to the court in an accurate, helpful and persuasive manner. In our experience, 14 days from the close of discovery would not provide enough time to craft quality summary judgment motions in most cases.

- Rule 56(e)(1): Length of summary judgment motions for Track B cases. Proposed Rule 56(e)(1) provides that a motion for summary judgment with accompanying memorandum in a Track B case must not exceed 14 pages in length without prior approval of the Trial Court. We respectfully contend this page limit is too short. Summary judgment motions often are relatively complex and have the potential to bring a case to conclusion. In order for the moving party to demonstrate the absence of genuine factual disputes and its entitlement to judgment as a matter of law, that party typically has to make a comprehensive factual and legal presentation to the court. In our experience, 14 pages would be an insufficient general limit for this purpose in most cases, even cases that are less complex for purposes of assignment by the court to Track B status.

- Rule 56(e)(2)(A)(i): Limits on numbers of facts in statements of undisputed material facts. Proposed Rule 56(e)(2)(A)(i) provides that statements of undisputed material facts shall be limited to no more than 25 asserted facts in Track B cases and 50 asserted facts in Track C cases. We respectfully believe these limits are too low. As discussed above, summary judgment motions are relatively complex and require the moving party to make a comprehensive presentation of information to the Trial Court, which includes a careful recitation of the undisputed material facts in the case. We are aware that some litigants have filed statements of undisputed material facts that are too long and include too many asserted facts, but this proposed rule goes too far in an effort to

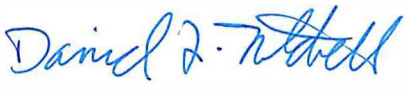
address that problem. While it may be possible in some Track B and Track C cases to use a relatively small number of asserted facts, each case is different, and the proposed limits would be insufficient in many cases. It would be more consistent with the principles of DCM to refrain from imposing a one-size-fits-all limit on the front end of a case, and to have the parties and the court confer again toward the completion of discovery for the purpose of determining (1) whether any party desires to file a motion for summary judgment, and (2) what an appropriate number of asserted facts would be in light of how the case has developed.

- Rule 56(f)(1): Opposing memorandum limited to 14 pages. Proposed Rule 56(f)(1) provides that a party's memorandum opposing a motion for summary judgment – in either a Track B or Track C case – may not exceed 14 pages. We respectfully view this page limit as too low. A party opposing a summary judgment motion may need not only to rebut the moving party's characterization of the case, but to present and argue for an entirely different one of its own. In many cases, this will be very difficult to do within the confines of a 14-page limit. Faced with the very survival of some or all of its claims, the non-moving party should not suffer this constraint.

- Rule 56(f)(3)(A): Limits on numbers of facts in Statement of Additional Undisputed Materials Facts. Proposed Rule 56(f)(3)(A) provides that statements of additional undisputed material facts shall be limited to no more than 25 asserted facts in Track B cases and 50 asserted facts in Track C cases. For reasons similar to those we discuss above regarding the proposed limits on opposition memoranda to summary judgment motions, we respectfully suggest these proposed limits on statements of additional undisputed material facts are too low. Oppositions to summary judgment motions require the opposing party to make a comprehensive rebuttal of the facts asserted by the moving party, and in many instances to present a different conception of the undisputed facts of the case through additional assertions. While it may be possible in some Track B and Track C cases to use a relatively small number of asserted additional facts, the proposed limits would be insufficient in many cases. In our view, it should be left to the Trial Court, in consultation with the parties' counsel, to set an appropriate limit on additional factual assertions at any appropriate time in the life of the case.

Again, we appreciate the opportunity to comment on these important proposed changes, and we would be pleased to provide additional information to the Court at its request.

Sincerely,



Daniel J. Mitchell

Sincerely,

Michael R. Bosse

Aderant
BETTER TOGETHER

October 2, 2018

VIA ELECTRONIC MAIL

Matthew Pollack
Executive Clerk
Maine Supreme Judicial Court
205 Newbury Street, Room 139
Portland, Maine 04112-0368

Re: Comments to Proposed Amendments

Dear Mr. Pollack,

We have reviewed the proposed amendments to the Maine Rules of Civil Procedure ("RCP") out for comment until October 5, 2018, and write to bring the Court's attention to a few issues arising therein.

First, we request clarification as to how the proposed amendments will be applied to existing cases. The Court has proposed major changes to RCP 16 and 16A regarding differentiated case management, as well as changing most deadlines to 7 day increments. If the proposed amendments are approved, for example, will cases commenced before the effective date be assigned to a case management track as set forth in amended RCP 16? Or will they continue to be governed by the rules prior to the amendments? In order to prevent confusion, we respectfully suggest that the amended rules apply only to cases commenced on or after the effective date of the amendments.

Second, we note that we have concerns regarding the following specific proposed amendments:

RCP 14

Proposed RCP 14 states that "[t]he notice of removal must be filed within the time for serving the answer to the third-party complaint." The proposed amendments to RCP 12(a) provide that an answer is due 21 days after the service of the summons and complaint, and thus it would appear that for third-party complaints, the notice of removal must be filed within 21 days after service of the summons and third-party complaint.

We note that 28 USC 1446 requires a notice of removal to be filed within 30 days of receipt by or service on defendant of the initial pleading or summons, whichever period is shorter. We respectfully suggest that the proposed amendment regarding removal be either deleted from RCP 14, or changed to a 30 day period to be consistent with the 28 USC 1446 removal requirement.

RCP 56

Proposed RCP 56(f)(1) provides a deadline to file an opposing memorandum to a motion for summary judgment, stating in part: "A party opposing the motion must, no later than 21 days after the motion for summary judgment has been filed, file a memorandum opposing the moving party's motion . . . ."

Subsections (f)(2) and (f)(3) require that the opposing party create an opposing statement of facts and statement of additional undisputed material facts. However, no specific deadline is set for these documents. Does the Court intend that they be filed together with the opposing memorandum? If so, we propose that subsection (f) be revised to first set forth the deadline to file the opposition in general (21 days after the motion for summary judgment is filed) and then list the documents that make up the opposition, i.e., the memorandum, opposing statement of facts, and statement of additional undisputed material facts, as well as the requirements for each of those documents. This would also be more consistent with the rest of the rule, as proposed RCP 56(g) re the reply to the opposition is also set up this way.

RCP 4B, 30, 32 & 53

Currently, there are no proposed amendments to RCP 4B(c), which sets a 30 day deadline for trustee process to be served, or to RCP 32(d)(3)(C), which sets a 5 day deadline to object to the last questions authorized under RCP 31.

Further, while there is a proposed amendment to the language of RCP 30(c)(5), this subsection also sets a 3 day deadline to object to the taking of a deposition re the recording method. In addition, there is a proposed amendment to RCP 53(e)(2), but RCP 53(e)(5) sets a 5 day deadline for the party to make a motion for referee to amend its report or make additional findings or recommendations, as well as a 10 day deadline to serve objections after filing of a supplemental report. These deadlines have not been amended.

As one of the stated purposes of the proposed amendments is to change the deadlines to increments of 7, should the above rules also be amended to change the time periods to use 7 day increments?

Thank you for your time and consideration of these comments.

Sincerely,

Eleni Blumenfeld-James
Rules Attorney
eleni.blumenfeld-james@aderant.com

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October 5, 2018

Matthew Pollack, Executive Clerk
Maine Supreme Judicial Court
205 Newbury Street, Room 139
Portland, Maine 04112-0368

RE: ***Civil Justice Reform for Maine's Courts***

Dear Matt:

The Court has asked for comments regarding its proposals for civil justice reform. First, I have been trying cases in the Maine Courts, and other courts, for more than thirty years. During that time, I have tried well more than a hundred jury cases and hundreds to thousands of other litigated matters.

Before writing this letter, I have spoken to many of my colleagues who do, on a full-time basis, civil cases in the Superior and District Courts. They included plaintiff's attorneys and defense attorneys. I actually spoke to more plaintiff's attorneys than I did defense attorneys. It is my understanding that the Maine Trial Lawyers Association will be providing the Court with comments, but I wanted to provide my own.

First, the Court's stated goal for the just, speedy and inexpensive resolution of civil cases is laudatory. My clients, as well as the clients of other attorneys, share that stated goal. However, the institution of a variety of "reforms" appears to be a solution in search of a problem.

More than a decade ago, this Court instituted a mandatory mediation process. From all that I have seen, that mandatory mediation process has been a great success. In turn, throughout the nation, many have undertaken mediation and voluntary resolution processes prior to jury trials. Concern has arisen that civil jury trials have decreased

substantially. That, of course, is true. However, the reason for their decrease is that both plaintiffs and defendants prefer the certainty of non-jury trials to the uncertainty of juries and jury decisions. Personally, I both trust and like the jury process system. Its function is essential to the proper operation of a civil society. In Maine, access to a civil jury trial is much easier than in other states in which I have practiced (see especially Massachusetts and Connecticut) and I don't remember ever hearing a plaintiff or a defendant complain that they could not get a jury trial if they wanted one.

I understand that the National Center for State Courts has set up a test framework and that efforts in Maryland, New Jersey, Minnesota, New York, Texas and Utah have been undertaken. None of those states are Maine. Maine is a smaller, much more rural state, and we are at the disability of not having even twentieth century computer systems for our clerks and staff. The process the Court has proposed will overwhelm the judicial staff. Additionally, a proposal which, fundamentally, relies upon more supervision from already overburdened Superior Court Justices is doomed to fail. The Superior Court Justices I deal with every day are extraordinary. They take home more work than they can possibly do during the day. They are confronted with aging courthouses, lack of staff, and generally outdated and antiquated courthouses. Through all of this, they work, tirelessly, to deliver justice. This proposal will leave them with an inability to deliver justice.

My understanding from talking to others is that there was a committee that dealt with adopting these potential new rules. There has been no transparency regarding that committee despite requests. No one knows who was on the committee, what the committee decided or whether there were any dissents. All of us were simply presented with this fait accompli. In speaking with members of the Civil Rules Committee, as well as several Superior Court Justices, none believe that this system can work. I have no doubt, given the size of the state, that this information has been given to the Supreme Court. I am hoping that with the comments that I understand are being delivered to the Court, the Court will understand that this process, as proposed, cannot succeed.

I am in favor of changing many of the rules of discovery to match up with the federal rules. Proportionality has to become part of the discovery process. Too often both sides abuse the discovery process and the Superior Court Justices are restricted from pointing to rules regarding proportional discovery. That should be the first rule change. Next, asking for ADR to be earlier in the process, when no one has dug into the facts of

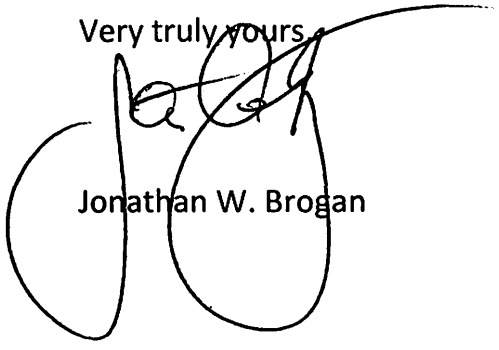
the case or the potential for resolution, makes the process worse not better. Finally, arbitrarily asking Judges to enforce strict guidelines on simple requests for extensions mean that either less justice will be delivered or both sides will present a worse case to a jury. Stating that continuances "are available only in exceptional circumstances" means that the Justices will be restricted, by Rule 40, to responding to actual day-to-day problems of litigants and their lawyers.

Speaking as a very busy trial lawyer, I hope the Court understands the difficulty associated with timelines that are essentially cast in stone. The life of any trial lawyer is difficult and stressful. There are numerous articles written and much is said about the work we trial lawyers undertake and the effect it has on our personal lives and families. That effect is only multiplied by timelines that Superior Court Justices are directed to enforce without the ability to use the discretion that they accumulated through years of practice as lawyers and judges.

At every seminar I attend in Maine, involving the judiciary on both the state and federal level, it is noted that the Maine bar is extraordinary. I agree. Part of the extraordinary nature of the Maine bar is that they understand each other's potential problems and get along with each other so that we don't have to involve the Court in disputes about timelines, designations, etc. Certainly some fail to have this collegiality. But it is a hallmark of the Maine bar and this proposal seems to fly in the face of all of the praise that the Courts have given Maine lawyers over the last thirty years. Please don't create a system that is worse than the system we already use.

I hope if you have any questions or concerns, you will contact me, or if the Court has any questions or concerns that I can answer, in person, that they will contact me as well. Thank you.

Very truly yours,



Jonathan W. Brogan

JWB/etr

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PETER L. EDMANDS
(Retired)

October 3, 2018

By email only to: lawcourt.clerk@couts.maine.gov

Matthew Pollack
Executive Clerk
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205 Newbury Street; Room 139
Portland, ME 04112-0368

RE: Civil Justice Reform for Maine's Court/Proposed Rule Changes

Dear Matt:

Attached please find my comments on the proposal to adopt civil justice reform in Maine resulting in numerous changes to the Maine Rules of Civil Procedures.

I am submitting these comments as a member of the Maine Bar, having practiced law in Maine since 1987. Since June, 2004, my practice has been predominantly representing either injured parties or Defendants who were insured by liability insurance, in the Maine Superior Court. Since February of 2016, I have tried nine jury cases in five different counties to verdict. I currently have over thirty civil cases pending in numerous counties. My comments are based upon my first-hand experience with the proposed rules that are subject to amendments and my comments are supported by my first-hand experience.

Thank you for the opportunity to provide this information.

Sincerely,

Harry B. Center, II, Esq.

HBC/mab

Comments on the Proposed Changes to the Maine Rules of Civil Procedure

Initially, I wish to state my concern with the proposed amendment's summary which states that "we know the following". We do not all "know" or agree that civil process costs too much and takes too long. From the first time I stepped foot in a courtroom in Maine, as a law student intern in 1986, I was advised and taught that Maine Attorneys behave respectfully and cooperatively with each other. There are fifty different states as well a federal court system and all are unique. Perceived issues with civil litigation in other states do not translate into the need for reform in Maine.

My first-hand, extensive experience with the Maine Rules of Civil Procedure as well as having a law practice consisting primarily of initiating lawsuits in the Superior Court and bringing them to completion either through settlement or verdict leads me to observe that the current problems with civil litigation in Maine are separate and independent from the majority of the proposed changes in this proposal. To the extent that civil litigation takes too long in Maine the issue has absolutely nothing to do with the existing rules and how attorneys practice within them. A lack of judicial resources, court facilities, and the ability to have cases heard on the civil docket, because most of the sixteen (16) counties are dealing with an extremely crowded and extensive criminal docket is why civil cases in Maine take too long.

Rule 16B

When I began practicing in 1987, civil litigation in the Superior Court, had no formal alternative dispute process. Meaningful settlement discussions did not occur until a case was placed on a trial list. The implementation of Rule 16B has drastically reduced the number of cases that go to trial. My personal, first-hand experience is that the majority of litigants are pleased and satisfied with resolving their cases at mediation. Mediation is not a trial. In my opinion it is not an opportunity for persuasion of the opposing party, but rather conciliation and an explanation of all issues so that the parties may attempt to reach a middle ground for settlement. Therefore, any rules which attempt to formalize the mediation process in my view will have a chilling effect on its use. The most effective mediations are held when all parties have all the information necessary to properly assess the strengths and weaknesses of their case. It is a serious mistake to attempt to schedule mediation sooner in the litigation process. I have recently been extremely disappointed to receive notices of fines and sanctions from one particular county, if the parties have not completed or notified the court of the ADR process within days of the deadline. In the remaining fifteen (15) counties, cases linger for literally years before they are placed on a trial list at the expiration of discovery. In some counties cases wait up to three years after an unsuccessful mediation. In the absence of intentional delay tactics, the rules should provide that prior to a case being scheduled for a trial management conference they shall have either completed ADR or otherwise addressed the rules as to why the case has not gone to some type of mediation. Efforts to force earlier deadlines into the process only hinder the prospect of having a meaningful mediation.

I urge that Rulel 6B(f)(i) "individual parties" be amended to add a paragraph or phrase which allows insured parties, usually defendants, to be excused from attending mediation. In the majority of personal injury claims, the defendant is of absolutely no benefit to be present at the

mediation. Often times, the operator of a vehicle which was insured and operated with permission at the time, has long since disappeared. In reality, the defendant is an insurance company handling a claim. On a rare occasion when an insured has been present at mediation, as a well-intended lay person trying to be involved in "their case", it only hinders reaching a settlement which is completely governed by the decisions of an insurance adjuster and the injured person. In practice, we do not force insured parties to appear at these mediations. It makes sense to acknowledge that practice in a rule and allow for excusing insured parties.

The extensive changes set forth in Rule 7(b), should also be utilized to address any issues with mediation, to the extent that one party is intentionally avoiding mediation or otherwise failing in good faith to participate in the ADR process.

Jury Fee Rule 38

The jury fee should not be due until the case is placed on a trial list and a trial management conference is held. The constitutional right to a jury trial should not be treated as a technical deadline where one party missed the filing fee, a constitutional right is extinguished. Since the implementation of the jury fee a number of years ago by an executive branch that was faced with a significant shortfall in the judicial budget, the civil jury fee has at times become a technicality which on occasion denies a citizen's right that was granted by the founding fathers in the constitution. I propose a rule that the jury fee is only due when requested, at the time of trial.

Tracking Rule 16

I generally agree with a concept of tracking different types of cases. As a simple automobile collision case with insurance coverage is drastically different then a complicated medical malpractice case. However, as a matter of practice requiring the parties to attempt to confer prior to a scheduling of management tracts is completely unrealistic. In the context of contentious civil litigation such as boundary disputes, beach access, nuisance claims, large corporate commercial cases and the like, it is completely unrealistic to believe that two parties who are at such a disagreement that they have had to resort to civil litigation, will be able to confer at the outset of the case about extensive issues regarding narrowing issues in dispute, agreeing on stipulations, discovery and settlement positions. With respect to the type of cases I generally handle, insurance carriers are large corporations, big bureaucracies, and rarely are able to provide counsel that they are going to hire with significant information at the outset of a case. On numerous occasions I received panic calls from my colleagues who do a majority of insurance defense work asking for extensions of time to answer complaints, literally asking me what type of case it involved. It would be impossible for me to engage in any type of meaningful discussion with them regarding the actual case at that time.

Perhaps the rule could allow for the plaintiff to provide an indication to what type of tract a case would be, then at the time of filing answers defendants can agree to the tract and the case would proceed accordingly or at that point conference and request court intervention if the parties cannot agree as to what type of case is being presented.

Automatic Disclosures Rule 26A

Having state civil claims follow the federal court practice of initial disclosures is not a completely bad idea. I am in agreement with a rule to limit the number of years for producing prior medical records, and prior earnings if applicable. In my own experience all defense lawyers have been extremely reasonable and understanding with regard to prior medical records. There should be a provision, however, allowing plaintiffs to provide defense with medical authorizations with the accompanying list of professionals, should the plaintiff choose not to incur the cost of obtaining prior records.

To the extent that the Court is compelled to limit the number of interrogatories I don't have a strong opinion. Interrogatories are generally used to produce what is needed to process the case. Regarding limitations on depositions, in my experience those rules are largely ignored. Attorneys agree to depose as many people as necessary in order to discover the case.

An amendment to Rule 26(B)(4) as a result of the initial disclosures could provide an opportunity for a rule clarification regarding expert witnesses. In my experience lawyers agree that following strict expert witness disclosure deadlines is unrealistic. If a case is going to involve retained experts (as opposed to treating medical providers) adequate notice is given and disclosures are made so that discovery depositions may be conducted.

Continuances

The amendments to Rule 40 regarding the assignment for cases provides an opportunity to comment about the issue of continuances. While not subject to an amendment, I remain troubled by Rule 40(C), the last sentence which states that the fact that a continuance motion is unopposed does not assure the relief will be granted. The case belongs to the parties, not the court. If both attorneys and both parties agree that the case is not ready for trial what is the rationale for forcing a dispute to be decided when the parties are either unprepared, unable to present all of their evidence, or for other reasons unable to go forward with trial at that time? I would propose that the rule rather than the exception is that requests for continuances by both parties, for legitimate reasons should be granted in all circumstances absent the Court expressly finding that the reasons are due to some inappropriate action.

80B Case

I have had a municipal practice at various levels from time to time over the years and I have done a number of Rule 80B cases. I am pleased that the rule is amended to place the burden of filing a record on the governmental agency such as the municipalities, zoning board, or board of assessment review rather than requiring most times a pro se citizen to find that they have no judicial review due to their lack of understanding about preparing a record. This is a positive amendment and I strongly urge that it be adopted.

Thank you for the opportunity to comment on these proposed rules.

COMMENTS TO THE PROPOSED AMENDMENT TO THE RULES OF CIVIL PROCEDURE

I. Rule 3

The proposed amendment to Rule 3 would reduce the time in which the served complaint, return of service, and civil case information sheet must be filed with the court from 20 days to 14 days. On average my office receives returns of service from the Sheriffs' offices 10 to 14 days after service of the complaint. I have no reason to believe the experience of my office is unique. A 14 day deadline to file the served complaint and civil case information sheet would be unreasonably short. A 21 day deadline would be far more likely to enable consistent compliance without the need for motions to enlarge the deadline.

II. Rule 7

Proposed Rule 7(b)(A) requires that a party making a "request" under the rules "confer with the opposing party in a good faith effort to resolve by agreement the issues in dispute." In a practice that handles consumer debt collection communicating with an unrepresented party is not always an option. First, pro se litigants often fail to provide proper contact information, including phone numbers. Second, under the Maine and federal Fair Debt Collection Practices Act ("FDCPA") a consumer can demand that a debt collector, which is defined to include attorneys, cease communication with the consumer entirely, or by specified means such as the telephone. 15 U.S.C. §1692c(c); 32 M.R.S. §11012(3). Rule 7 and other proposed Rules, such as Rule 16(e)(2)(C), require conferring with opposing parties but provide no guidance for what to do when such communication is not possible or barred by statute. Guidance in the Rules or the Notes, for how to handle such a common situations should be provided reduce problems in the future.

III. Rule 16

Proposed Rule 16(a)(1) assigns all collection actions to Track A, which allows for "no discovery except upon order of the court and good cause shown." The Rule and Notes give no indication as to what constitutes "good cause" for allowing discovery. I have been litigating collection actions since 2005 in the Maine District and Superior courts. In my practice if a defendant files an answer disputing the action I, as a matter of course, I serve discovery. This allows me to properly prepare for a dispositive motion or trial by determining the nature of the dispute, the facts that are contested, and the facts that are not. I have found discovery to be a vital and necessary tool to properly litigate cases, including collection actions. Rule 16 should not deprive litigants in collections actions of the right to pursue discovery barring permission from the court without providing guidance about under what circumstances that permission may be granted.

Likewise, proposed Rule 16(b)(c) indicates that a case may be reassigned to a different track "for good cause shown." Again, the Rule itself and the Notes provide no guidance as to what a showing of "good cause" would entail. Such guidance should be provided given the novel nature of these proposed amendments.

IV. Rule 16A

Proposed Rule 16(b)(4) requires that the parties, not later than 7 days before a pretrial conference, prepare and serve pretrial memorandum including "the names and addresses of all witnesses the party intends to call at trial." For collection actions, and other types of proceedings, a party may intend to call a business records witness, who may be one of a pool of

qualified employees. In such matters the identity of the particular witness who will testify at trial may not be available until after the pretrial conference. An exception for such records witnesses, or guidance in the Notes for how to handle such situations should be included in the amended Rules.

V. Rule 16B

Proposed Rule 16B(a)(1) requires that an ADR conference be scheduled within 42 days after entry of the Rule 16 scheduling order and held within 91 days after entry. In my experience, actions filed in the Superior Court in which one of the litigants is unrepresented are very difficult to successfully schedule for an ADR conference. To resolve this issue, guidance in Rule 16 itself, or the Notes, should be included for handling such situations where communication with an unrepresented party is limited or a party does not cooperate in the scheduling of the ADR conference.

VI. Rule 36

Proposed Rule 36 eliminates all requests for admissions except for those as to "the genuineness of any relevant documents" without court permission. No standard or guidance is provided in the Rule, or the Notes, as to the circumstances under which requests may be granted or denied. Additionally, the Rule does not allow admissions to be served in Track A cases and goes on to state that no requests for admissions "may be served in debt buyer collection actions described in Rule 80N."

Requests for admissions, when utilized correctly, can be a simple and efficient method of discovery. Admissions allow parties to simplify the process of proving the required elements of

a case and narrow the issues for trial. Admissions can also be a helpful evidence to support a motion for summary judgment. Admissions are an inexpensive and easy method to conclusively establish facts in an action, not just the genuineness of documents.

Rule 36 should not be modified to curtail a tool that allows parties to easily, inexpensively, and efficiently, reduce the issues required for a dispositive motion or to be proved at trial. Additionally, there is no justification for depriving parties involved in debt buyer actions from utilizing admissions as opposed to other categories.

VII. Rule 55

Proposed Rule 55(a) states that "the clerk shall enter the party's default" when a party fails to plead or defend without waiting for a request by the opposing party. Thereafter, the clerk shall send a written notice that the matter will be dismissed if no further action is taken within 28 days. In my practice I am frequently contacted by attorneys and unrepresented parties asking that I not default them due to a pending bankruptcy filing, to allow a settlement to be reached without entry of judgment, or other appropriate reasons for delay. I have found such arrangements to be a convenient means to give the other party the needed time without wasting the court's time with a motion to enlarge the answer deadline. The strict, and short, time limits of Rule 55, as proposed, will eliminate this efficient and informal practice. This could be avoided by a longer time period before dismissal or additional time before sending written notice to the party bringing the claim.

VIII. Rule 56

Proposed Rule 56(b) makes motions for summary judgment available to Track A cases and credit card, student loan, and debt buyer collection actions only upon request and prior approval of the court. No standard or guidance is provided in the proposed Rule, or in the Notes, for when such approval may be allowed or denied. Summary judgment is not a extreme remedy. Curtis v. Porter, 2001 ME 158, ¶ 7, 784 A.2d 18. It is a procedural device used to obtain judicial resolution on those matters which may be decided without fact-finding. Id. It is an appropriate practice encouraged in most litigated cases in order to effectuate policies of judicial economy. Guardianship of Jo Ann L., 2004 ME 68, ¶ 11, 847 A.2d 415. Rule 56 should continue to allow all cases to use the tool of summary judgment motions.

IX. Rule 80N

Proposed Rule 80N applies to all collection actions brought to collect credit card, student loan debt, and all debt buyer actions. As a preliminary matter, the proposed rule seems to overlook that credit cards are frequently issued to businesses and that debts owed by commercial entities are sold to debt buyers. Such cases should not simply be lumped in with consumer matters as there is a higher likelihood the party alleged to owe money is represented by counsel and that the issues are more complicated.

As proposed Rule 80N(b)(1) includes "Information Required" to be alleged in the complaint for collection actions. The language appears to be taken directly from the provisions of the Maine FDCPA concerning debt buyer collection actions. 32 M.R.S §§ 11013, 11019. The "Information Required" is, therefore, focused entirely on bought debt and debt buyers. As a result it should not be a requirement for credit card or student loan cases that are not debt buyer actions. For example, requirements for naming the original creditor and current owner are

nonsensical when there is no debt buyer. To attempt to comply with when the issuer of the credit card account or student loan is the plaintiff would be unnecessary and confusing.

Other items of the "Information Required" are also problematic. This includes subsection (C) which requires the "principal amount due at charge-off." This provision is no longer consistent with Title 32, section 11013(9)(D), which has been changed to simply "amount due at charge off." The proposed Rule should be amended to either reflect the current language of the Maine FDCPA or simply require compliance with the provisions of that statute that concern debt buyer actions.

Subsection (K) requiring a statement that the cause of action is filed within the statute of limitations is unnecessary. By filing an action the party bringing the lawsuit is, by that act, asserting that the statute of limitations has not expired.

Subsection (L) is particularly troubling. It requires, if the plaintiff is a debt buyer, that the "original creditor's account number" be provided in "a non-public affidavit attached to the copy of the complaint served on the creditor." No definition of what a "non-public affidavit" is, nor what it must include, is provided in the Rules or Notes. Additionally, it is typically the creditor who is bringing suit in such cases, therefore, no complaint is "served on the creditor." It makes far more sense to simply eliminate this provision or require that the last 4 digits of the account number be provided in the complaint, which complies with federal law.

Proposed Rule 80N should eliminate the "Required Information" section as unnecessary in light of the requirements placed on debt buyer actions placed in the Maine FDCPA or be redrafted to apply to credit card and student loan actions. As currently drafted the "Required Information" is confusing as it was intendedto deal with debt buyers.

Proposed Rule 80N(b)(2)(A) and (B) require a "copy of a form answer" and "collection action summons" to be served in addition to the complaint in any credit card, student loan, or debt buyer collection action. No copy of the form answer or collection action summons has been provided to date for review. It is not possible to evaluate this proposed rule change without the form answer and collection action summons to examine. Until the form answer and collection action summons is available for review and comment, this Rule should not be amended to include these provisions.

Subsection (c)(2) indicates that if the filings of for a collection action are satisfied "the case shall proceed as a Track B civil action." This is inconsistent with the proposed amendments to other rules, including Rules 7 and 16, which indicate collection actions would be assigned to Track A.

Subsection (f) allows the court to dismiss an action "with or without prejudice" upon a determination that "the plaintiff did not comply with the requirements of this rule or other applicable laws." No guidance is provided as to when dismissal will be appropriate with prejudice. It is unfair that a mere clerical error in a tort case will not result in dismissal with prejudice, but a similar unintentional or non-material error could result in the punishment of dismissal with prejudice in a collection action.

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Comment to proposed rule changes and implementation of Differentiated Case Management

1 message

Mary Denison <mdenison@lakedenison.com> Thu, Oct 4, 2018 at 3:22 PM
To: "lawcourt.clerk@courts.maine.gov" <lawcourt.clerk@courts.maine.gov>

Good Afternoon –

I would like to comment on the following proposed change to M.R. Civ. P. 80B(e):

(e) Record.

(1) *Preparation and Filing Responsibility*. Except where otherwise provided by statute or this ~~Rule~~ rule, ~~(i) it~~

(A) It shall be the ~~plaintiff's~~ governmental agency's responsibility to ensure the preparation and filing with the Superior Court of the record of the proceedings of the governmental agency being reviewed, and ~~(ii) the~~

(B) The record for review shall be filed at the same time as or ~~prior to~~ before the plaintiff's brief. Where a motion is made for a trial of the facts pursuant to subdivision (d) of this ~~Rule~~ rule, the moving party shall be responsible to ensure the preparation and filing of the record and such record shall be filed with the motion.

I understand that the intent behind this proposed revision is to decrease the delay that sometimes occurs in the Superior Court's receipt of the complete record in an 80B appeal. Based upon my experience working with Rule 80B appeals and smaller rural municipalities, I do not believe that shifting the burden of production to the municipality will speed up the time frame for filing the record and may instead have quite the opposite effect. Many of the small towns I work with have very limited staff, limited office hours, and little involvement by the Town Clerk or Administrator with the Planning Board or Board of Appeals processes. In an 80B appeal, it is generally the applicant/landowner and the applicant's neighbors who play the primary roles in the appeal procedure. They will usually have retained counsel in order to file and/or defend an appeal and the attorneys should have a good grasp on the appropriate documents, recordings, and plans that make up the administrative record in any given case. Most town clerks and officials are completely unfamiliar with Rule 80B and will not understand the scope or the content required for filing a proper and complete record with the court. In addition, if the record is voluminous, as it can be in some land use cases, the cost of reproduction would normally be borne by the Plaintiff/Appellant. This proposed revision to the rule does not provide an opportunity for a municipality to recoup any of its costs incurred in the preparation and filing of the record.

Respectfully submitted,

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October 2, 2018

Maine Supreme Judicial Court
205 Newbury Street, Room 139
Portland, Maine 04112-0368

RE: Proposed Changes to Civil Rules

Dear Chief Justice and Members of the Court:

I am very concerned about several of the proposed changes to the Civil Rules.

My experience for several years has been that many members of the bar just ignore discovery requests and get away with it. Sanctions don't happen unless there have first been multiple conferences, and blatant disregard of discovery orders. It usually does not go that far, but the delays still add up.

It seems to me that discovery responses in civil cases have very little priority with busy attorneys. As a result of that, or perhaps intentional tactics to slow down the litigation, responses hardly ever are made within the thirty days the rules require. When combined with the requirement that the lawyer seeking discovery must make an informal attempt to get agreement with opposing counsel (through phone calls or letters, including a face to face conference requirement), it can easily take three months just to get a discovery conference and then an order requiring answers to interrogatives or document production. Even then such an order often grants several more weeks for compliance. Just setting up the communications necessary to discuss the discovery issues can be delayed if calls and letters are not returned. Many times after an order gets entered the other lawyer finally produces a response, but often the response is incomplete or evasive, and may trigger a need for follow-up discovery.

I think one positive change in the rules you could make would be to eliminate the requirement of an informal attempt to resolve the issues. Just allowing a request for a Rule 26 discovery conference to be made by letter as soon as no

timely discovery response has been made, or as soon as a discovery response has been made that is believed to be non-responsive or evasive.

The proposed deadlines also do not take into account the idea that a discovery strategy may involve seeking information in distinct sequential steps and seems to assume that all discovery requests can be made at the same time. Often documents need to be requested first, followed by interrogatories inquiring about those documents after they are (finally) received, and then perhaps requests for admissions or depositions. If delay by opposing counsel is used at each stage, the process can take more than a year, which is not the fault of the lawyer seeking the discovery, or his client.

All of these problems may drive the parties to conduct more depositions, where evasions are less effective, but doing so drives up costs of litigation, which is not the desired result.

The rules obviously need to provide immediate and effective sanctions for failure to make requested responses. (The rules already provide a protective order remedy if the discovery requests are unreasonably burdensome for a particular case.)

Setting strict discovery deadlines as the proposed rules attempt to do effectively hamstrings the lawyer seeking discovery. It requires him/her to either give up the discovery requests or to file one or more motions to extend all the scheduling deadlines because of non-responsiveness. This puts the costs on the client seeking discovery when it is the non-responsive party who is causing the delay, and getting away with it without cost. If a lawyer does not want to seek any discovery, a short discovery time period should affect only him/her, but there should be a longer, more flexible time period for the lawyer who can demonstrate that he/she is diligently engaged in the discovery process.

Additionally, changing Rule 36 regarding requests for admissions goes in exactly the wrong direction. That rule is the one place where a failure to respond results in automatic admissions. That is one of the few tools that the attorney requesting information can employ when an opposing attorney ignores discovery deadlines and does not even bother to file objections. Therefore I believe that there is not any good reason to limit the use of that rule only to establish that documents are genuine.

With regard to the proposed time limits and page limits regarding motions for summary judgment, I think they are too short and not warranted. The changes assume that a lawyer with a busy practice, perhaps without associates or

researchers, can nonetheless write motions as important as Rule 56 motions, and fully comply with the detailed requirements of that Rule, within a very short time. I think clients who have approved the use of a summary judgment motion in their case understand that doing it right is much more important than doing it fast. That also means that not being able to make all available arguments because of page limitations is not in the litigants' interest.

I understand the forces that drive the push for quicker and cheaper resolutions of cases, but overall the effect of the proposed changes just drives disputes into what looks more and more like Small Claims Court. I think we should avoid that impairment to the process.

Sincerely,

John P. Foster

JPF/rs

cc: Maine Trial Lawyers Association

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October 5, 2018

Matthew Pollack, Executive Clerk
Maine Supreme Judicial Court
205 Newbury Street Room 139
Portland, Maine 04112-0368

Re: The Proposed Amendments to the Maine Rules of Civil Procedure

Dear Mr. Pollack:

In response to the Court's request for comment on the proposed amendments to the Maine Rules of Civil Procedure, I have set forth below some issues that I respectfully request that the Court consider. If it's helpful for the Court to know my background, I have practiced solely civil litigation for 30 years; I handle both plaintiff's cases and defense cases, including cases involving personal injury, claims of professional negligence, product liability, and construction claims, to name just a few areas where I work extensively. I served on the Advisory Committee on the Maine Rules of Civil Procedure for three 3-year terms; I chaired that Committee for most of those 9 years. I also have a very active mediation and arbitration practice. I regularly practice in most of Maine's 16 counties, but am most active in Cumberland, York, Androscoggin, Kennebec, Penobscot and Oxford counties.

My comments appear in numeric order, by rule:

I am concerned about **Rule 7(f)**, which proposes reducing the page limit for memoranda of law for nondispositive motions from 10 pages to 7 pages, for dispositive motions from 20 pages to 14 pages, and for replies from 7 pages to 5 pages. The current page limits are already quite short and it is often difficult to fully brief the legal arguments within those limits. I respectfully suggest that the court not adopt these new, shorter page limits.

Proposed changes to **Rule 15** gives only 7 days to respond. That is a very short time. If an attorney is in trial or on vacation the week the amended pleading is served, she cannot timely respond. If the Court's desire is to have timelines be in 7-day increments, I respectfully suggest changing the time limit for a response to 14 days.

Rule 16(d)(5) says: "The court may expressly order that the costs of sanctions be borne by counsel and not paid by counsel's client." Does that mean that the judge is going to require the lawyer to reveal confidential information about communications between her and her client?

How else will the court be able to determine whether the attorney or that attorney's client has to pay the sanctions?

Rule 16(e)(2)(C) and (3)(B) require that the parties confer about a number of issues at the very beginning of a case. How is a defendant who may know little or nothing about a case supposed to intelligently discuss things like settlement, alternative dispute resolution, narrowing the legal issues, stipulations, dispositive motions, and the like? While plaintiff's attorneys often have cases for years before suit is filed, it's not uncommon for a defendant to know nothing about a case until well after suit is filed and some discovery has occurred. Similarly, without any information from the defendant, a plaintiff may be unaware of what will be disputed. But the proposed rule requires this conference before a scheduling conference even occurs. Then, at the initial conference, the attorneys are required to discuss with the Court narrowing the issues. Many times the lawyers for both parties cannot know early on what the issues are. For example, if a defense attorney does not even know the damages claimed, how can she possibly advise the court whether the damages are contested? Cases are dynamic and follow the evidence; without any evidence, how does the Court propose that these topics be seriously discussed?

Rule 16A requires pretrial memoranda, even in Track B cases like motor vehicle accident cases. This seems unnecessary. If the Court is concerned about streamlining the process and reducing costs, I respectfully suggest that the Court make pretrial memoranda optional – at least for Track B cases.

Also, the backlog of civil cases seems to be quite large in some counties. These proposed changes require additional court conferences that were not previously held. Is it realistic for the Court to find judicial time to conduct these conferences? Given the level of work that the judges are currently handling, will this just lead to more delays in civil proceedings because it will take so much additional judge time to conduct these conferences?

The proposed changes to **Rule 16B** are concerning because they require mediation so early in the process that it is much less likely to be successful. In my work as both a civil trial lawyer and a mediator who has resolved hundreds of cases for others over the years, I have seen that if the parties come to the negotiating table too early, the case is much less likely to settle. Lawyers are reluctant to advise their clients about settlement and likelihood of success at trial until they are aware of the evidence that will likely be presented at trial. I hope that the Court will not adopt these changes as it is likely to make the costs and effort put into mediation much less likely to resolve the cases. I frequently have parties postpone mediations under the current rules because they have not had time to fairly evaluate the case. Defendants will not offer money when they feel more information to evaluate a claim. A frequent reason this occurs in personal injury cases is the delay in obtaining medical records or testimony from experts and treating physicians.

I'm also concerned about the shortened time line for reporting on the results of the mediation. Often, in the 10 days following the mediation, the parties resolve the cases – either because of further involvement by me or another mediator, further discussion directly among the parties, or the resolution of a lien issue. If the Court's interest is in keeping all time limits in 7-day increments, I respectfully suggest enlarging the time to report to 14 days, not shortening the time limit.

I endorse the change that indicates that only where a corporation's interests are not represented by an insurer must a corporate representative attend the ADR in person. I respectfully suggest a similar exception for the attendance of individual defendants. Requiring a defendant to miss a day of work to attend a mediation where he has no say in whether the case resolves or at what amount it resolves does not advance the process; often, such attendance makes the matter much less likely to settle. I've mediated many cases where the animosity between the parties either gets in the way of a resolution or convinces the insurer not to resolve the case.

New **Rule 26A(b)(1)** regarding the deadline for plaintiffs to file initial disclosures does not address what happens when there is more than one defendant. I respectfully suggest that the rule state that the time for filing is triggered by the last defendant's answer to the complaint.

Given the new requirement of initial disclosures, I am not concerned about the limits on the number of interrogatories and document requests that can be served on another party, and I support the elimination of the blanket right to serve requests for admissions on non-documentary issues. I have seen the present unlimited right to serve any number of requests for admissions abused on quite a few occasions (in one case, for example, I represented a husband and wife who were each served with 180 requests for admissions, which were not identical). I am happy to see the Court effectively end that practice.

I respectfully suggest that the Court also limit the areas of inquiry that can be included in notices under the current Rule 30(b)(6) and the proposed new **Rule 30(c)(7)**. The lack of a limit on the areas of inquiry has led to some abuse. For example, I was recently served with a corporate deposition notice listing more than 60 areas of inquiry. That required the company to proffer many different corporate deponents, and enabled the opposing party to avoid the limits on the number of depositions that can be taken. This is not uncommon in practice where a corporation is a named party.

The proposed new **Rule 40(b)** is concerning because it states that trials will be held in other counties to accommodate the court's scheduling issues, without requiring agreement of the parties. This is concerning on several levels. First, it will be more difficult for witnesses to travel to a different county to testify. If a witness in a York County case is required to travel to Bangor or Machias to testify, that is obviously problematic and greatly increases the costs and

inconvenience borne by the witness. It may also mean that the witness is outside the subpoena power of the party who calls the witness, to compel him to appear. Second, juries in different counties see cases differently and value them differently; not knowing the venue of a case has a significant impact on how each side evaluates and tries the case.

Rule 41(a)(1) states with respect to voluntary dismissal by stipulation: "A dismissal under this paragraph may be as to one or more, but fewer than all claims, but not as to fewer than all of the plaintiffs or defendants." I have never understood why the parties have to file a motion for dismissal of fewer than all defendants. This is not required by the federal court and seems to be unnecessary. If all the parties agree to the dismissal of one of several defendants, or one of several plaintiffs, there appears to be no reason that a motion would need to be filed. In practice, the motion is granted as a matter of course (but it obviously takes time to prepare and file it and for the court to act on it). I respectfully suggest that the Court remove this language from Rule 41(a)(1).

I am very happy to see the proposed new **Rule 45** which places the burden more on the litigants seeking the information than the current rule which requires the person in possession of the information to bear the costs of the production, including the need to file a motion for protection where known privileged information is sought.

Proposed **Rule 56(b)(3)(1)** pertains to summary judgment on foreclosure actions and requires that the moving party establish that the service and notice requirements of 14 M.R.S. § 6111 have been strictly performed. Because that statute does not apply to all foreclosure actions, but only those involving foreclosures on residential properties where the debtor is living in the mortgaged property as her primary residence, I respectfully suggest that the Court revise this provision to state that the Court needs to determine either that the service and notice requirements of 14 M.R.S. § 6111 have been strictly performed or are not applicable.

Rule 56(e) significantly curtails the length of summary judgment memoranda in Track B cases. I respectfully urge the court to keep the current 20-page limit. It is already difficult to address the legal issues raised, for example, by a multi-count complaint in a 20-page memorandum. Reducing that page limit by nearly one-third will make it much more difficult to both seek and oppose summary judgment. I'm also concerned about the proposed limit on the number of facts that can be included in a statement of material facts. For example, unless all employment law cases will be placed on Track C, the limit to 25 facts is likely to effectively prevent motions for summary judgment in those cases.

Thank you for your consideration of my concerns and insights into the proposed new rules.

Very truly yours,

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EAG/

COMMENTS TO PROPOSED
AMENDMENTS TO THE
RULES OF CIVIL PROCEDURE
AND
THE RULES OF SMALL CLAIMS PROCEDURE

I. Rule 7

A. Proposed Rule 7 (b)(1) adds a "Requests" procedure, requiring communication with the opposing party, correspondence with the court, and a conference. A designated list of rules are referenced that require this procedure: Rules 16(d)(4), 26B(g), 36(b), and 56(b)(1).

But the Rules reference many other "requests" in the context of a litigated matter:

1. Rule 7(g) - request for telephonic hearing
2. Rule 16(c) – request to change track
3. Rule 16A(d)(6) - request for advance ruling
4. Rule 16B(b)(4) - request for exemption from ADR
5. Rule 40(e) - request for protection
6. Rule 45(g)(2) - request to resolve objection to subpoena
7. Rule 45(h)(2) - request to resolve compliance deficiency
8. Rule 47(f)(2) - request for disclosure of juror names
9. Rule 55(c)(1) - request for clerk's entry of default judgment
10. Rule 55(g) - collections fee

11. Rule 56(b)(4) - request for summary judgment in certain collection actions

12. Rule 56(c) - request for alternate timing of motion for summary judgment

13. Rule 56(e) - request to exceed motion page length

14. Rule 56(e)(2)(A)(i) - request to exceed number of asserted facts

15. Rule 56(f)(i) - request to exceed opposition page length

16. Rule 56(f)(3)(A) - request to exceed number of asserted facts

17. Rule 56(g)(1) - request to exceed reply page length

18. Rule 80C(f)(2)(c) - request to modify contents of the record

19. Rule 93 - requests for mediation

20. Rule 110B - request to hold prehearing conference

21. Rule 117 - request for hearing

22. Rule 133(b) - request for discovery dispute conference[1]

B. Many of these references to "requests" involve a mere communication that is granted as a matter of course or does not involve the exercise of judicial

[1] In Rule 40(c), continuances are sought by motion. For the sake of consistency and continuity, the references to "request" in this sub-section should be changed to "motion". Similarly in Rule 80B(i)(1), a motion is required for an order specifying the future course of proceedings. The reference to "requesting" should be changed to "asking". Similarly in Rule 80C(e), a motion is required for additional evidence. The reference to "request" should be changed to "ask". See also Rule 80C(i)(1) re: changing "requesting" to "asking". Similarly in Rule 93(c)(5), a motion is required to return a case to the regular docket. The reference to "requesting" should be changed to "asking". See also Rule 93(d)(2) re: changing "requesting" to "seeking". See also Rule 93(k) with reference to "requesting" on a motion for continuance. See also Rule 93(a) referencing a "request" on a motion to waive mediation. See also Rule 93(q)(1) referencing a "request" on a motion to order mediation.

discretion, *e.g.* Rule 55(c)(1) and Rule 93. In this context, perhaps the terms "application" or "apply for" should be used. As a special case of this example, Rule 7(g) should be amended to describe a process where applications for telephonic conferences are granted as a matter of course, rather than merely "encouraged". There have been too many times when requests for telephonic conferences have been denied arbitrarily. To the extent a court has "good cause" to deny such an application, the "good cause" should be stated on the record.

Rule 16B(b)(4), as amended, greatly expands the number of "requests for exemption" from ADR that may, and will, be made. Such "requests" will be granted as a matter of course when the certification of damage amount box is checked on the Civil Case Information Sheet, without the exercise of judicial discretion. Since the request is a mere formality when the certification is made, Rule 16B(b)(4) should allow for the exemption simply upon the requisite certification, without reference to a "request" (as the "request" may be assumed).[2]

C. Other instances of the term "request" do involve the exercise of judicial discretion, but do not rise to the level of the Rule 7(b)(1) procedure. In such instances, the court will grant or deny the "request", often without explanation. Many of the rules with this type of "request" have long been a part of the Civil Rules of Procedure, and do not need any guidelines for the exercise of that discretion, *e.g.*, Rule 40(e). However, some of these instances are new in the proposed rules, and deserve guidelines, either in the Rule itself or in the Notes thereto. See the discussion of Rule 56(b)(4), *infra*.

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[2] Given the broad reach of the cases subject to ADR, exemption should be allowed when the plaintiff, and when part of the case, a counterclaim plaintiff, cross-claimant, or third-party complaint plaintiff certifies on the Civil Case Information Sheet that the likely recovery of damages will not exceed $50,000.00.

D. Still other examples of "requests" under the proposed rules should be linked to Rule 7(b)(1).

1. Rule 16(c) allows a request to change the track assignment of any case. A conference processed is then triggered, and that process should conform to Rule 7(b)(1).

2. Rule 56(b)(1) is linked to Rule 7(b)(1), but Rule 56(b)(4) is not. It is certainly not obvious why this should be the case. There certainly is less of a need or occasion for summary judgment in Track A expedited cases that have no discovery except by court order. Rule 56(b)(4) collection actions are Track B cases subject to mandatory discovery disclosure, optional discovery procedures, and ADR. They are more deserving of a conference process on a "request" to file a motion for summary judgment, since a conference process will result in a ruling that weighs the issues and which may be reviewed for abuse of discretion. In arriving at such a ruling at conference, the court should have guidance to inform its discretion, but Rule 56 as proposed provides none. Unlike Rule 16(d)(4) (modification of scheduling order for good cause shown) and Rule 26B(g) (where the court draws upon the extensive jurisprudence governing discovery to decide disputes), Rule 56(b)(4) does not allow for a showing of good cause or if it did, does not indicate what good cause might be in this novel context. Will it matter that all parties are represented by counsel, or that the amount in controversy is sizeable, or that there are no genuine issues as to any material fact?

In the context of the limitation on summary judgment for the listed collection actions in Rule 56(b)(4), the Supreme Judicial Court [hereinafter "the Court"] should bear in mind that many so-called "credit card" collection cases are not actions to collect consumer debt, but are actions, commercial in nature, against a business entity. Businesses have and use credit cards. These actions should not be "lumped in" with the consumer credit collection actions, but to the extent the Court insists upon doing so, they should be exempted from the presumption against a motion for summary judgment.[3]

E. The disparate treatment of certain collection actions in Rule 56 is echoed in Rule 36(a)(last sentence). Commercial credit card cases are not distinguished from consumer credit card cases, and no requests for admission are allowed, without the option of requesting a conference under Rule 7(b)(1) to obtain permission for requests for admission beyond the authenticity of documents. Here the Court is ignoring *Midland Funding LLC v. Walton*, 2017 ME 24, ¶9, which noted the proper use of requests for admission in a consumer credit case, without any criticism whatsoever. My comments as to Rule 56 apply to this proposed Rule 36, if not more so. At least with Rule 56, the Court has allowed a party to the disfavored consumer collection actions to request permission to file a motion for summary judgment.

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[3] The Court does not discuss the distinctions that led to the treatment of certain collection actions differently from other lawsuits. Presumably the Court is trying to advance certain social justice objectives to protect consumers. The impetus for this did not come from the Advisory Committee of the Civil Rules, so the rationale will not be found in any Advisory Committee Notes or even the so-called Advisory Notes which do accompany the proposed rules and which mistakenly imply that the Advisory Committee had any significant role in their promulgation. Rather the Court should set forth clearly its rationale and a discussion of the issues in an Explanation of Amendments. Moreover, for each rule, the Explanation of Amendments should explain how the proposed rule advances the policy objective and does not unfairly treat the affected causes of action. In particular, with Rule 56, the Court should explain the reasons for the presumption that summary judgment will not be available.

F. Moving on, Proposed Rule 45 is discussed further *infra*, but it appears that the team that worked on this proposed Rule was not in communication with the team that worked on Rule 7(b)(1). For consistency, the conference provisions within both rules should be the same.

II. Rule 16[4]

A. Rule 16(a)(1) specifies that " residential mortgage foreclosures and collections [sic] actions" belong in Track A. Query whether these are mistaken designations. No type of mortgage foreclosure or collection action is listed as a Track A case in the draft Civil Case Information Sheet. Under Rule 80N(c)(2), the collection actions therein specified are referred to Track B once the Complaint passes initial screening that the initial filings are adequate.

B. The references to "settlement documents" at proposed Rule 16(d)(2)(A) and 16(d)(3)(B) should be changed to "settlement demands".

C. Rule 16(d)(2)(B) states, *inter alia*, that in Track B cases, the scheduling order " . . . may immediately assign the case for trial without further pretrial process if the court determines that such pretrial process is unnecessary." (I

[4] Under the current Rule 16(a)(1), the Standard Scheduling Order in Superior Court is issued after the "filing of the answer." Under proposed Rule 16(b)(2)(A), a scheduling order in Track B cases issues after case assignment to Track B, and assignment occurs, under Rule 16(b)(2), when "an answer or other response is filed . . ." It would not be appropriate for the court to issue a scheduling order, especially one that set the case for immediate trial, if the response to the complaint were a motion for more definite statement, or other motion permitted under Rule 12. While current practice in the Superior Court allows the scheduling order to issue before an answer to a counterclaim is filed, or before a third-party has responded to a complaint, the better practice is to await completion of the pleadings. Certainly, a case management conference in Track C cases should await completion of the pleadings, or at least an appearances from each party.

assume that this language means that the scheduling order may assign the case for immediate trial.) How is the court to make this determination? At the scheduling order phase of a Track B case, all the court has before it is the Complaint and Answer. If the court is inclined to exercise this option it should obtain input from the parties, by setting a case management conference.

III. Rule 40

A. Since "conferences" are more particularly described as part of the "Request" procedure of Rule 7(b)(1), references to continuances in the rules should include "conference" as one of the events subject to a motion to continue, *i.e.*, Rule 7(b)(4) and 7(b)(5).

B. The proposal to amend Rule 40(c) makes the granting of continuances "the exception and not the rule" because the purpose and goal of the rules is to provide "predictable judicial action" and an "effective and efficient process for resolving disputes." Those may be the purpose and goal of the rules, but the experience has been, and will likely be, less than ideal.

Predictable judicial action may approximate the goal in Track A cases when the court has assigned the case for immediate trial, with a date certain, or in Track C cases where the scheduling order is required to "identify the date or *specific* time period for trial." Rule 16(d)(3)(B) (emphasis supplied). Presumably this means that the practice currently prevailing in the Business and Consumer Court will be applied to Track C cases, whereby the parties are told early on that trial will be held during a specific trial list during a particular month(s), or even during a particular week. But in Track B cases, the Rule provides only that the scheduling order "identity the date or time period specified for trial . . ." Rule 16(d)(2)(B).

The absence of the adjective "specific" in describing "time period specified for trial" means that a general forecast will suffice, *e.g.*, that trial will occur after the pre-trial conference as set by the court, as is the current practice. Current practice is what it is because of the significant constraints placed on dockets by caseloads, resources, and staffing issues, both judicial and clerical. For instance, it is not uncommon for a case in District Court not to appear on a trial list for several months after the pre-trial conference. These concerns will not disappear merely because the civil rules are amended.

While "predictable judicial action" may be the purpose and goal of the civil rules with respect to trials, that cannot be said about the other court events that may be subject of a motion to continue, hearings and conferences. Most of these events are not predictable at the inception of the case, as they follow the peculiarities of the litigation and the issues that emerge. A discovery dispute occurs, a conference is requested. The conference may be scheduled for the next day or in several days or even weeks. How can that be anticipated so as to place a burden of an "exceptional" showing to justify a continuance?

There are currently several hundred civil cases pending in the District and Superior Courts that have not had the benefit of the new tracking procedures and the "predictable judicial action" that will accompany them. Will the "exceptional" standard for a continuance be applied to them? That would appear not to be fair.

The absence of any Explanation of Amendment for this proposed rule means that the bench and bar have no examples of how the rule should be applied. Presumably if counsel for plaintiff suffers a medical emergency, that would meet the "exceptional" test. But what of the attorney's vacation, planned months ahead

with tickets purchased, that happens to be set for the period of a just-scheduled trial of a Track B case that has sat for months waiting its turn to be placed on a trial list. Attorney vacations are not exceptional, they are standard occurrences. Will the new rules mean the attorney is out of luck?

If not, what does "exceptional" actually mean. The proposed rule amendment makes no change to that portion of Rule 40(c) that states "Continuances should only be granted for substantial reasons." In this regard the Advisory Committee Note to the amendment to Rule 40 effective January 1, 2006 states:

> Substantial reasons may include, but are not limited to, conflicts arising from (1) another scheduled court event that is a higher priority case as determined by the priority of cases established by the Supreme Judicial Court; (2) another scheduled court event in another jurisdiction; (3) long-standing travel or vacation plans of a party or attorney; (4) unforeseen witness unavailability; (5) unexpected family-care responsibilities; and (6) other unforeseeable reasons such as illness or death.

How are these examples changed by the requirement of exceptionality?

As a final point, is this amendment really needed now? The amendment to Rule 40 effective January 1, 2006 also states:

> The amendments to the rule are designed to promote greater uniformity and predictability with respect to court event scheduling. A key determinant of event certainty in the courts is the application of uniform and predictable approaches to continuances and protections. The absence of uniformity and predictability results in more frequent postponements of scheduled court events that increase the time,

> expense, and clerical work associated with the resolution of disputes. The revised rule is intended to make the public and the courts more mindful of the long-term negative consequences that event uncertainty has on the public, judicial resources and, ultimately, the administration of justice.

If the frequency of postponement of scheduled court events continues to be a serious problem of court administration, why have the measures adopted more than a decade ago not worked, and should other actions be taken first before raising the standard for a continuance to "exceptional", such as allowing the tracking system to be implemented and tested before concluding that this change is in fact needed.

IV. Rule 41

The proposed amendment to Rule 41(b) (Involuntary Dismissal) allows for the dismissal of an action, after notice and hearing etc., on the court's own motion "for a plaintiff's failure to comply with these rules or any order of court." There is no Explanation of Amendment describing the circumstances when this action by the court may be appropriate. How is judicial discretion to be exercised in this context? Presumably, such action would only be taken for "serious" or "significant" failures to comply that amount to contumacious conduct or that undermine the administration of justice, but the proposed rule does not attempt to define the circumstances that might justify such action.

Why is this vague and broad grant of authority needed? Are judges and justices concerned that they do not have the requisite authority to sanction conduct? Isn't it preferable to grant such authority in the context of the specific rule or type of order involved?

V. Rule 45

Please see a marked up version of the proposed Rule, appearing at the end of these comments.

VI. Rule 55

The proposed amendment to Rule 55(a) seems designed to clear recently filed cases as stale if no "further action" is "taken" within 28 days after a written notice is "sent" by the clerk after an entry of default. It seems to assume that clerks will effectively monitor the 21-day answer/response period and will efficiently enter the appropriate defaults. That may in fact be the case, but the elimination of the current rule's language "and that fact is made to appear by affidavit or otherwise" should not be read to mean that a plaintiff may not spur a busy clerk to action by means of the aforementioned affidavit and would have to wait until the clerk acted, *sua sponte*, before moving ahead with case. In this regard, I recommend the addition of a second sentence to Rule 55(a) that would appear before the sentence beginning "Upon entering the default . . .": "A party may inform the clerk, by affidavit or otherwise, that an entry of default is appropriate."

In most actions that seek judgment for a "sum certain" these provisions will not come into play, because a plaintiff will timely seek the clerk's entry of default at the same time, and in the same document, that it seeks a clerk's entry of judgment pursuant to Rule 55(c)(1). In other actions, where judgment may only be granted by the court, the 28 day period will often be insufficient due to delays in serving the clerk's notice or the necessity of compiling supporting affidavits,

exhibits and memoranda. A more lengthy response period time, say to 42 days, will mean that fewer motions for enlargement of time are filed.

The SJC should be concerned that a clerk's zealous monitoring of the 21-day response period may disrupt a common courtesy among lawyers: the informal granting of an extension of time to answer or otherwise respond to a complaint. Plaintiff's counsel may receive a request from a defendant, or defendants counsel at the eleventh hour: An out-of-state defendant needs more time to find counsel in Maine, a local attorney needs more time to consult with her client and decide whether to take the case, a defendant's local counsel will not be back from vacation for a week, a *pro se* defendant needs time to respond. In these instances, there is not yet a local counsel to enter an appearance and request an enlargement of time or a pro se party is unfamiliar with the procedure. Yet, professional courtesy among attorneys, and common courtesy to unrepresented people, resolves the problem. However, a "premature" entry of default would add needless complexity to this situation. Solution? Require the clerk to forbear from entering a default if notified in writing that the parties have agreed to an informal extension of time to a date certain.

Language appears in Rule 55(a) that is undefined. The 28-day period begins to run after notice is "sent" by the clerk. Usually time periods run from the date of entry of the relevant document, *e.g.* the filing of a motion or the entry of judgment. The time period here should run from the date of entry of default, with the clerk to serve the requisite notice to the plaintiff pursuant to Rule 77(d) and to the defaulted defendant at the address shown on the civil case information sheet. On the other hand, a plaintiff has 28 days (presumably calculated with the aid of Rule 6) to take action after the notice is sent. Is the date of such action to be determined by the

date of filing of that action? If so, the rule should so state. If not, what is appropriate date?

Proposed Rule 55(a) inexplicably requires the plaintiff to send a copy of the clerk's 28-day notice to the defaulted person. The clerk should mail that notice at the same time the plaintiff is notified. That action will be docketed and be part of the record. Otherwise, is the plaintiff required to certify that it has complied with this rule at some point in the proceedings?

VII. Rule 76C

The proposed amendments to Rule 76C(a) add a new first sentence: "By electing to file a cause of action in the District Court, the plaintiff is deemed to have waived the right to remove the action to the Superior Court for jury trial." The scope of this new rule is unclear. Is it designed merely to clarify an ambiguity in the current rule or does it reach further. Will the amended rule bar a plaintiff from removing a case to Superior Court for jury trial where the plaintiff's action seeks a declaratory judgment (or other action not entitled to be tried to a jury) and is met with a counterclaim for damages? The proposed rule should be amended to clarify that, for purposes of the waiver provision, a plaintiff against whom a counterclaim is filed is deemed a defendant.

VII. Rule 80N and Rule 1 of the Rules of Small Claims Procedure

PL2017, c.216 enacted changes to the Maine Fair Debt Collections Practices Act, 14 M.R.S. c.109-A. In particular, Sec. 6 of c.216 enacted 32 M.R.S. §11019

which states, in pertinent part at Sec. 3, regarding a collection action by a debt buyer:

> **3. Requirements for judgment.** Regardless of whether the consumer appears in the action, the court may not enter a judgment in favor of a debt buyer in a collection action against a consumer, including an action brought in small claims court pursuant to Title 14, chapter 738, unless the debt buyer files with the court:
>
> A. A copy admissible under the Maine Rules of Evidence of the contract, application or other writing establishing the consumer's agreement to the debt and any contract interest or fees alleged to be owed. If a signed writing evidencing the original debt does not exist, the debt buyer must file a copy of a document provided to the consumer before charge-off demonstrating that the debt was incurred by the consumer or, for a revolving credit account, the most recent monthly statement recording the extension of credit for the purchase of goods or services, for the lease of goods or as a loan of money or the last payment or balance transfer;
>
> B. Business records or other evidence admissible under the Maine Rules of Evidence to establish the amount due at charge-off;
>
> C. A copy admissible under the Maine Rules of Evidence of each bill of sale or other writing establishing transfer of ownership of the debt from the original creditor to the debt buyer. If the debt was assigned more than once, the debt buyer must file each assignment or other writing evidencing the transfer of ownership to establish an unbroken chain of ownership, beginning with the original creditor to the first debt buyer and each subsequent debt buyer; and
>
> D. Notwithstanding any other law, if attorney's fees are sought under contract, a copy admissible under the Maine Rules of Evidence of the contract evidencing entitlement to attorney's fees.

(emphasis supplied).

This new requirement of an action in small claims court having to comply, in certain respects, to the Maine Rules of Evidence ran counter to Rule 6, Maine Rules of Small Claims Procedure, which provides as follows at section (b):

> (b) Evidence. The rules of evidence, other than those with respect to privileges, shall not apply. The court may receive any oral or documentary evidence, not privileged, but may exclude any irrelevant, immaterial, or unduly repetitious
> evidence.

Hence, the Court was faced with a dilemma: Should it amend the Rules of Small Claim Procedure to conform Rule 6 to the requirements of §11019? Or should it determine that §11019 was of "no force and effect", to the extent it requires that the Maine Rules of Evidence be applied in a small claims proceeding, because it conflicts with Rule 6[5].

The course chosen by the Court is seen in the proposed amendment to Rule 1, Maine Rules of Small Claim Procedure, and proposed Rule 80N, Maine Rules of Civil Procedure. As proposed, Rule 1 will read:

> **RULE 1. SCOPE OF RULES**
> These rules govern the procedure in all small claims actions in the District Court and on appeal in the Superior Court. Whether a claim may be brought as a small claim is limited by 14 M.R.S. § 7482, 32 M.R.S. § 11019, and Rule 80N[6] of the Maine Rules of Civil Procedure. ~~They~~ These rules shall be construed to secure the just, speedy, and inexpensive determination of every action in a simple and informal way.

As proposed, Rule 80N will read, in pertinent part:

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[5] Pending promulgation of Rules 1 and 80N, practice in small claims proceedings has conformed to the requirements of §11019.

[6] Rule 1 incorporates Rule 80N and complies with Rule 81(b)(2)(A), Maine Rules of Civil Procedure, which provides: (2) *District Court*. These rules do not apply to the beginning and conducting of the following actions and proceedings in the District Court: (A) Actions under the statutory small claims procedure except as incorporated expressly or by analogy in the Maine Rules of Small Claims Procedure.

RULE 80N. CREDIT CARD, STUDENT LOAN, AND DEBT BUYER COLLECTION ACTIONS

(a) Applicability. This rule governs all collection actions brought to collect credit card and student loan debts, and to all collection actions brought by debt buyers as "debt buyer" is defined in 32 M.R.S. § 11002. This rule supersedes the general provisions of the Maine Rules of Civil Procedure only to the extent stated in this rule.

Together, these rule changes mean that credit card, student loan, and debt buyer collection actions may not be brought pursuant to 14 M.R.S. c.738, which provides for small claim proceedings.

This comment argues that the Court lacks the authority to promulgate Rules 1 and 80N, for two reasons: (A) The Rules Enabling Act with respect to small claims proceedings was superseded by the Act to Establish a Small Claims Court, and (B) to the extent the Rules Enabling Act has priority over the Act to Establish a Small Claims Court, Rules 1 and 80N violate the admonition of the Rules Enabling Act that the Rules not abridge the substantive rights of any litigant.

(A) The Rules Enabling Act with respect to small claims proceedings was superseded by the Act to Establish a Small Claims Court.

As part of the Herculean task of bringing Maine practice and procedure into modernity, PL1957, c.159 was enacted by 98th Maine Legislature to provide, *inter alia*, that the Supreme Judicial Court

> shall have the power to prescribe, by general rules, for the trial justices and for municipal and superior courts of Maine, the forms of process, writs, pleadings and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge nor

> modify the substantive rights of any litigant. They shall take effect 6 months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.[7]

This enactment, known as the Rules Enabling Act, allowed for the promulgation of the first version of Maine's Rules of Civil Procedure, issued June 1, 1959 and effective December 1, 1959. Coincidentally with the drafting of this first version of the Rules, involving substantial commitments of time from bench and bar, the Legislature was compiling a long list of affected statutes that needed to be amended or repealed and replaced[8]. PL1959, c.317 contained over 400 line items of such statutes. Those statutes that were not then amended, repealed or replaced and that were inconsistent with the Rules would be deemed superseded by the Rules[9].

Notably, the statutory small claims procedure, enacted by PL1945, c.307 and then found at RS1954, c.109, was unaffected. However, it is clear that the drafters of the Rules believed that they had the authority to modify the statutory small claims procedure, but chose not to. Small claims actions were brought in

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[7] This statutory language has remained essentially intact and may now be found at 4 M.R.S. §8.

[8] I am pleased to say that my sister's former father-in-law, Samuel H. Slosberg, Esq., as then Director of Legislature Research, gave "invaluable advice and assistance on all legislative problems." Foreword by Chief Justice Robert B. Williamson to Maine Civil Practice, Field & McKusick (1959).

[9] See Rule 81(e), which implemented the directive of the Rules Enabling Act that ". . . all laws in conflict [the Rules] shall be of no further force or effect". It read in 1959 as it does today: "(e) Terminology in Statutes. In applying these rules to any proceeding to which they are applicable, the terminology of any statute which is also applicable, where inconsistent with that in these rules or inappropriate under these rules, shall be taken to mean the device or procedure proper under these rules." See also Professor Richard H. Field's 1959 Reporters Notes to Rule 81(e): "Rule 81(e) is to cover the many instances where statutes couched in terms rendered obsolete by these rules have not yet been amended".

Municipal Court. The Court, pursuant to the Rules Enabling Act, promulgated the Municipal Court Civil Rules, also effective December 1, 1959. Rule 28 thereof stated, in pertinent part:

APPLICABILITY IN GENERAL

(a) To what proceedings inapplicable. These rules do not apply:
(1) To actions under the statutory small claims procedure.

Professor Field's Reporter's Note to this Rule stated:

> Rule 28(a) excludes from coverage of these rules various types of civil cases for which it seems desirable to preserve existing practice. RS1954, Chap. 109, provides a simplified small claims procedure which there is no reason to change.

This language from the Municipal Court Civil Rules when the District Court replaced the Municipal Court and the District Court Civil Rules were promulgated in 1962. As of 1981, District Court Civil Rule 81[10] stated:

APPLICABILITY IN GENERAL

(a) To What Proceedings Inapplicable.
These rules do not apply to the beginning and conducting of the following actions and proceedings in the District Court:
(1) Actions under the statutory small claims procedure except as to proceedings subsequent to the rendition of judgment.

In 1982, the 110th Legislature enacted PL1981, c.667, An Act to Establish a Small Claims Court, effective November 1, 1982. This bill repealed the prior

[10] Footnote 6, *supra*, states how Rule 81 reads today.

iteration of the small claims procedure, 14 M.R.S. §§7461-7475, and enacted 14 M.R.S. §§7481-7485. Sections 7481-7483 did not change prior law substantively (other than raising the "jurisdictional" limit of a small claim action to $1,000.00). However, §7484[11] was a rules enabling act for small claims procedure. It read:

> §7484. Procedures
> The procedures with respect to the commencement of the action, the fee, the notice to the parties, the settlement or hearing, the judgment, appeal and post judgment proceedings shall be set forth in rules of procedure promulgated by the Supreme Judicial Court. Such rules shall further provide that:
> 1. Notice to defendant. The clerk shall cause all notices given to the defendant in a small claims action, including, but not limited to, notice of the claim, date, time and place of the hearing and notice of any disclosure hearing, to be sent by postpaid registered or certified mail, addressed to the last known post office address of the defendant;
> 2. Rules of evidence. The rules of evidence shall not apply at the hearing and the court shall assist in developing all relevant facts;
> 3. Waiver of fees. The plaintiff may file an in forma pauperis application for waiver of fees;
> 4. Removal. There shall be no removal of small claims action to Superior Court; and

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[11] Section 7484 was repealed and replaced with §7484-A by PL1991, c.9, Part E, Sec. E-11 and E-12. Sec. 7484-A then read: "Procedures
1. Rules by Supreme Judicial Court. The procedures with respect to the commencement of the action, the fee, the notice to the parties, the settlement or hearing, the judgment, appeal and post judgment proceedings must be set forth in rules of procedure adopted by the Supreme Judicial Court.
2.Service of statement of claim and notice of disclosure. When requested by the plaintiff, the clerk shall cause the statement of claim and the notice of disclosure, including the notice of the place, date and time of hearing, to be served upon the defendant. A fee must be charged to the plaintiff for service. A plaintiff may elect to arrange for service of the statement of claim and the notice of disclosure, including the notice of the place, date and time of hearing, by someone other than the clerk."
Section 2 was repealed by PL1991, c.604, which also added a last sentence to Sec. 1: "Rules adopted under this section may not restrict the number of claims that may be filed in any given period."

> 5. Disclosure. There shall be a simplified enforcement of money judgment proceeding through which a judgment creditor may obtain the appearance of the judgment debtor at a disclosure hearing. The enforcement of money judgment proceeding shall be consistent with the provisions of chapter 502, except that the subpoena requirement may be met by another form of notice.

Pursuant to this authorization, the Court promulgated the Rules of Small Claims Procedure, also effective November 1, 1982. The order of these Rules followed, for the most part, the order of rule-making areas set by §7484: commencement of the action (Rules 2 & 3), the fee (Rule 2), the notice to the parties (Rule 4), the settlement or hearing (Rules 5, 6 & 7), the judgment (Rule 8), appeal and post judgment proceedings (Rules 9, 10 & 11).

Thus the question is posed: Do the restricted set of areas of rule-making established by An Act to Establish a Small Claims Court override the broader authority of the Rules Enabling Act? By familiar principles of statutory construction, the more specific statute controls the more general one. *Houlton Water Company v. Public Utilities Commission*, 2016 ME 168, ¶21, 150 A.3d 1284 (Me. 2016):

> As a familiar principle of statutory construction, specific statutes prevail over general ones when the two are inconsistent. *Fleet Nat'l Bank v. Liberty*, 2004 ME 36, ¶ 10, 845 A.2d 1183; *see also* 2B Singer & Singer, *Sutherland Statutory Construction* § 51:2 at 215 (7th ed. 2012) ("If an irreconcilable conflict does exist between two statutes, the more specific statute controls over the more general one . . . ."). Applying this principle to resolve the conflict between sections 1320 and 1321, we conclude that the more general provisions of section 1320, which covers many aspects of appellate procedure in an undifferentiated way, yield to the more specific terms of section 1321. As a result, notwithstanding Rule 3(b), section 1321 preserved to the Commission the authority to issue the amended order in August

2015, even though that administrative action revised an order that was the subject of a pending appeal.

Furthermore, the rule-making areas listed in §7484 (now §7484-A) exclude other areas of rule-making not listed, under the familiar principle of statutory construction *expressio unius est exclusio alterius*. *Musk v. Nelson*, 647 A.2d 1198, 1201-1202 (Me. 1994) (inclusion of one discovery rule exception to the statute of limitations for professional negligence implicitly denied the availability of other exceptions).

Taking these two rules of statutory construction together, the Act to Establish a Small Claims Court contained a rules enabling act for small claim procedures that specified the areas of rule-making within which the Court could promulgate rules. This specific rule-making authority is inconsistent with the broad and general rule-making authority of the Rules Enabling Act. Thus, it controls, and the Court may not deviate from the areas of rule-making authority delineated therein.

Proposed Rule 80N, Maine Rules of Civil Procedure, and proposed Rule 1, Rules of Small Claim Procedure purport to limit which "small claims" may be "brought" in a small claims proceeding by declaring that all credit card, student loan, and debt buyer collection actions must be brought in District or Superior Court. The scope of the small claims proceeding is defined by statute at 14 M.R.S. §§7481 and 7482[12], and the Court's proposal to modify that scope, or to

[12] "**§7481. SMALL CLAIMS ACT; JURISDICTION** There is established a small claims proceeding for the purpose of providing a simple, speedy and informal court procedure for the resolution of small claims. It shall be an alternative, not an exclusive, proceeding. The District Court shall have jurisdiction of small claims actions. The District Court shall have the power to

limit the applicability of §§7481 and 7482 is beyond the rule-making areas set out in §7484-A. Hence, the Court lacks authority to promulgate these proposed rules.

(B) To the extent the Rules Enabling Act has priority over the Act to Establish a Small Claims Court, Rules 1 and 80N violate the admonition of the Rules Enabling Act that the Rules not abridge the substantive rights of any litigant.

> The rules enabling act authorizes the regulation only of pleading, practice, and procedure. The rules "shall not abridge, enlarge, or modify the substantive rights of any litigant." The dividing line between substance and procedure is not always easy to draw. For example, the question whether an action is barred by a statute of limitations is a matter of substance; but the question as to when an action is considered to have been commenced so as to toll the statute of limitations is presumably procedural. Field & McKusick, Maine Civil Practice, §1.2 (1959).
>
> The United States Supreme Court has reaffirmed the language in which it construed the Federal Rules Enabling Act in *Sibbach v. Wilson*, decided in 1941 [312 U.S. 1]:
>
> > The test must be whether a rule really regulates procedure, - the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.
>
> Field, McKusick & Wroth, Maine Civil Practice, §1.2 (2nd Edition 1970).

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grant monetary and equitable relief in these actions. Equitable relief is limited to orders to return, reform, refund, repair or rescind."

In pertinent part, "**§7482. DEFINITION OF A SMALL CLAIM** Notwithstanding the total amount of a debt or contract, a "small claim" means a right of action cognizable by a court if the debt or damage does not exceed $6,000 exclusive of interest and costs. It does not include an action involving the title to real estate."

The question posed here is whether the small claims statutes, 14 M.R.S. §§7481 and 7482, are substantive law, or merely procedural. If the former, the Court may not abridge them by limiting the small claims remedy through a restriction of the types of cases that may be brought as small claims. If the later, the Court is free to make whatever Rules it chooses (subject to argument A above).

Certain hypotheticals help to focus the distinction: May the Court alter the small claim scheme by changing the "jurisdictional" amount? Currently set at $6,000.00, may the Court now change it to $35, the amount set in the original enactment of 1945? Or increase it to $30,000.00? May the Court alter the small claim scheme by promulgating a rule that allows a small claims action that involves title to real estate, provided that the value of that real estate is less than $75,000.00?

If you bristle at the suggestion that the Court may make such changes, you will tend to conclude that these statutory provisions are substantive. This visceral reaction, however, is bolstered by certain statutory language in §7482. Paragraph 2 thereof states:

> Effective July 1, 1997 and every 4 years after that date, the joint standing committee of the Legislature having jurisdiction over judiciary matters shall review the monetary limit on small claims actions and the Judicial Department shall periodically provide information and comments on the monetary limit on small claims actions to that committee.

By reserving to itself the power and duty to review periodically the monetary limit in small claim actions, the Legislature is recognizing that this aspect of the law is substantive. Otherwise, it would delegate this function to the Court.

If the monetary limit is substantive law, so is the scope of the actions, "cognizable by a court" which may be brought as small claims.

Under the Rules Enabling Act, the Court may not "abridge, enlarge, nor modify the substantive rights of any litigant". Proposed Rule 80N and Rule 1 do precisely that. Whether these rules are deemed to re-define what is a small claim, or only limit in which court certain small claims may be brought, the effect is the same. The substantive law contained in 14 M.R.S. c.738 will be abridged and certain of the claims that the Legislature has determined are small claims will be deprived of the "simple, speedy, and informal" remedy that the Legislature intended.

For these additional reasons, the Court does not have the authority to promulgate said proposed Rule 80N and Rule 1.

Respectfully submitted,

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DRAFT

RULE 45. SUBPOENA

(a) Scope.

(1) *Scope*. Subject to paragraph (a)(2) of this rule, a subpoena may command a person or entity to

(A) testify by deposition upon oral examination pursuant to Rule 30;

(B) testify by deposition upon written questions pursuant to Rule 31;

(C) testify at trial or hearing; and/or

(D) (i) produce and permit the party serving the subpoena, or someone acting on that party's behalf, to inspect and copy any designated documents (including writings, books, drawings, graphs, charts, photographs, electronically or digitally stored information, and other data compilations from which information can be obtained, translated, if necessary, by the subject of the subpoena through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things that constitute or contain matters within the scope of Rule 26B(b) and which are in the possession, custody or control of the person or entity upon whom the subpoena is served; or (ii) permit entry upon designated land or other property in the possession or control of the person or entity upon whom the subpoena is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26B(b).

(2) *Subpoenas Directed to Parties to the Action*. A subpoena shall not be used to command a party to the action to testify by deposition upon oral or written examination, to produce during discovery or pretrial proceedings documents or tangible things, or to permit entry upon land for inspection and other purposes. Rules 30, 31, and 34 shall govern for those purposes.

(b) Form.

(1) Every subpoena shall

(A) state the name of the court from which it is issued;

(B) state the title of the action, the name of the court in which it is pending, and its civil action number;

(C) command each person or entity to whom it is directed to perform or permit one or more of the acts set forth in paragraph (a)(1) of this rule at a specified time and place;

(D) comply with the notice and other requirements of Rule 30(c) and Rule 31(a), except as otherwise provided in this rule; and

(E) set forth the text of subsections (e) through (i) of this rule.

(2) A command to produce documents or tangible things or to permit entry upon land for inspection and other purposes, as set forth in subparagraph (a)(1)(D) of this rule, may be included in a subpoena to appear at trial, hearing, or deposition, or may be set out in a separate subpoena. It shall set forth the items to be inspected either by individual item or by category and shall describe each item and category with reasonable particularity. The subpoena may specify the form or forms in which electronically or digitally stored information is to be produced.

(c) Issuance. A subpoena for the Superior Court may issue from the court in any county and for the District Court from the court in any district. The clerk shall issue a subpoena that is signed but otherwise in blank to a party requesting it, who shall complete it before service. An attorney admitted to the Maine Bar also may issue and sign a subpoena as an officer of the court.

(d) Service; Notice to Other Parties.

(1) *Service; Manner*. A subpoena may be served at any place within the state and by any person who is not a party and who is not less than 18 years of age, including the attorney of a party. Subpoenas shall be served on a party to the action who is the subject of the subpoena in the manner prescribed by Rule 5(b) and on a non-party in the manner prescribed by Rule 4(d), whether or not represented by counsel, or by other means agreed to and confirmed in writing by the subject of the subpoena. If the person's or entity's attendance is commanded, then at the time of service of the subpoena the fees for one day's attendance and the mileage allowed by law shall be tendered.

(2) *Service; Timing*.

(A) *Discovery or Pretrial Proceedings*. A subpoena issued for purposes of discovery or pretrial proceedings, as set forth in subparagraph (a)(1)(A), (B), or (D) of this rule, shall be served on the subject of the subpoena at least 14 days prior to the response date set forth in the subpoena.

(B) *Trial or Hearing*. A subpoena issued for purposes of hearing or trial, as set forth in subparagraph (a)(1)(C), or that requests the production of tangible things at hearing or trial, as set forth in subparagraph (a)(1)(D)(i) of this rule, shall be served on the subject of the subpoena at least 14 days prior to the response date set forth in the subpoena or as soon as practicable if fewer than 14 days are available.

(3) *Notice to Other Parties*. A copy of a subpoena shall be served on each party to the action as soon as practicable after the serving party receives notice of the effective service made on the subject of the subpoena or, in discovery or pretrial proceedings, at least 10 days before the response date, whichever is earlier, but the court on an *ex parte* application and for good cause shown may prescribe a shorter notice.

(e) Duties in Issuing and Serving a Subpoena.

(1) *Undue Burden or Expense*. The party or the attorney responsible for the issuance and service of a subpoena shall take reasonable steps to comply with this rule and avoid imposing undue burden or expense on a person or entity subject to that subpoena.

(2) *Command to Produce Documents and Tangible Things or to Permit Entry Upon Land; Rights of Other Parties*. With respect to a command to produce documents or tangible things or to permit entry upon land for inspection and other purposes, as set forth in subparagraph (a)(1)(D) of this rule, the serving party shall take reasonable steps to ensure that each party to the action, or someone acting on that party's behalf, has the same opportunity to inspect, copy, test, sample, enter, measure, survey, and/or photograph the requested documents, tangible things, land, and/or property as the serving party. If the serving party allows the subject of the subpoena to provide copies of the requested documents in lieu of making the original documents available for inspection and copying, the serving party shall promptly provide each party to the action with copies of all documents provided by the subject of the subpoena, unless otherwise ordered by the court.

(3) *Privileged or Protected Documentary Evidence*. If a party issues a subpoena that it or its attorney knows seeks the production of documentary evidence that may be protected from disclosure by a privilege, confidentiality protection, or privacy protection under law, rule, or order, the party shall include with the subpoena a signed authorization for the release of the information or a court order allowing production. If there is no authorization or court order, then the issuing party, before or after serving the subpoena but before the time for response, shall confer in good faith with the subject of the subpoena in an attempt to reach agreement about production, and, if the agreement includes a court order, then the party who issued the subpoena shall submit the agreed, proposed order to the court for approval.

If no agreement is reached, the issuing party shall file a letter with the court pursuant to Rule 26B(g) to obtain a court order for the disputed evidence. The letter shall contain a statement of the basis for seeking production of the documentary evidence that may be privileged or protected and shall be accompanied by a copy of the subpoena. Upon receipt of the letter, the clerk shall set the matter for ~~hearing~~ in-person, video, or telephonic conference and issue a notice of ~~hearing~~ in-person, video, or telephonic conference. The notice shall state the date and time of the ~~hearing~~ in-person, video, or telephonic conference and direct the party from whom the documentary evidence is sought to submit the documentary evidence subject to the subpoena for *in camera* review by the court or to adequately explain in writing any reasons for a failure to submit the documentary evidence for *in camera* review. Following the clerk's issuance of a ~~hearing~~ conference notice, the serving party shall serve a copy of the notice and the letter, together with the subpoena if not already served, on the subject of the subpoena in the manner prescribed by this rule for serving a subpoena.

Upon receipt of the ~~hearing~~ conference notice, the person or entity to whom the subpoena is directed shall either submit the documentary evidence subject to the subpoena for *in camera* review by the court or provide, in writing, reasons for the failure to submit the documentary evidence for *in camera* review before the date of the ~~hearing~~ conference. After the ~~hearing~~ conference, the court may issue any order necessary to protect any person or entity's privileges, confidentiality protections, or privacy protections under law, rule, or order.

(f) Duties in Responding to a Subpoena.

(1) *Objections*. A person or entity responding to a subpoena may object to it pursuant to paragraph (g) of this rule on the grounds set forth in subparagraphs (f)(2)(D), (f)(2)(E), (f)(3)(A), (h)(3), or (h)(4) of this rule.

(2) *Command to Produce Documents and Tangible Things or to Permit Entry Upon Land*. With respect to a command to produce documents or tangible things or to permit entry upon land for inspection and other purposes, as set forth in subparagraph (a)(1)(D) of this rule, a responding person or entity:

(A) need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing, or trial;

(B) shall produce the requested documents or tangible things as they are kept in the usual course of business or shall organize and label them to correspond with the categories requested in the subpoena;

(C) shall produce electronically or digitally stored information in the form requested in the subpoena or in a form or forms in which the information is ordinarily maintained or that is reasonably usable;

(D) need not produce the same electronically or digitally stored information in more than one form unless ordered by the court;

(E) need not provide electronically or digitally stored information from sources that are not reasonably accessible because of undue burden or expense and may object to the subpoena on that basis. The person or entity from whom the electronically or digitally stored information is sought must show that it is not reasonably accessible because of undue burden or expense. If that showing is made, the court may nonetheless order production if the serving party shows a substantial need for the information in electronic form that cannot otherwise be satisfied without undue hardship, considering the limitations and remedies of Rule 26B(c). The court may specify reasonable conditions for the production and shall impose on the party that served the subpoena the reasonable expense of producing such electronically or digitally stored information; and

(F) shall permit each party to the action, or someone acting on that party's behalf, the same opportunity to inspect, copy, test,

sample, enter, measure, survey, and/or photograph the requested documents, tangible things, land, and/or property as the serving party.

(3) *Claiming Privilege or Protection*.

(A) *Information Withheld*. When information subject to a subpoena is withheld on the basis of privilege, immunity from discovery, trial preparation materials, confidentiality protection, or privacy protection under law, rule, or order, the objection shall be made expressly on those grounds and shall be supported by a description of the nature of the documents or tangible things not produced that is sufficient to enable the serving party to contest the objection. The objection shall be presented in the manner prescribed by paragraph (g) of this rule.

(B) *Information Mistakenly Produced*. If information produced in response to a subpoena is subject to a claim of privilege, immunity from discovery, trial preparation materials, confidentiality protection, or privacy protection under law, rule, or order, the person making the claim shall notify any party that received the information of the claim and the basis for it. After being notified, recipients shall promptly return, sequester, or destroy the specified information and any copies, as directed by the producing party; shall not use or disclose the information until the claim is resolved by agreement or by the court; and shall take reasonable steps to retrieve the produced information if disclosed before notification of the claim. The claim may be resolved by any party to the action or by the person making the claim in the manner prescribed by paragraph (g) of this rule. The subject of the subpoena who produced the information must preserve the information until the claim is resolved, regardless of who asserted the claim.

(g) Objection to a Subpoena.

(1) *Manner of Objection*. No written motion shall be filed objecting to a subpoena without prior approval of the court. In lieu of seeking permission to file a motion, the objecting person, entity, or party may, no later than 7 days after service of a subpoena on that person, entity, or party,

(A) serve a letter on the serving party setting forth the objection; and

(B) make a good-faith effort to confer in person or by telephone to attempt to resolve the objection by agreement.

If an objection is made to a subpoena served for purposes of pretrial or discovery proceedings, as set forth in subparagraphs (a)(1)(A), (B) or (D) of this rule, the subpoena shall not be enforced except pursuant to an order of a justice or judge under this rule.

If an objection is made to a subpoena issued for appearance or production at a hearing or trial, as set forth in subparagraphs (a)(1)(C) or (D)(i) of this rule, then the subject of the subpoena is required to attend and produce as commanded unless otherwise ordered by a justice or judge.

Objections made during deposition testimony that was compelled by subpoena shall be addressed as provided in Rule 30.

(2) *Court Involvement*. If the objection is not resolved by agreement, then the person or entity subject to the subpoena, the serving party, or any other party to the action may file a letter with the clerk of the court in which the action is pending requesting ~~a telephone conference or hearing~~ an in-person, video, or telephonic conference with a justice or judge.

(A) The letter shall identify the title of the action, the name of the court in which it is pending, and its civil action number; identify the particular appearance, production, or inspection commanded to which there is objection; state the objection and relief sought without argument or citation; and attach a copy of the subpoena at issue.

(B) The letter shall constitute a representation to the court, subject to Rule 11, that the required conference has taken place, but without success, or that a good faith effort to resolve the objection has been attempted unsuccessfully.

(C) The letter shall be served by delivering a copy to the person subject to the subpoena and all parties to the action as provided in Rule 5(b).

(D) The clerk shall direct the letter to the justice or judge who has been specially assigned to hear the action, or to any available justice or judge if the action has not been specially assigned or subject to single justice or judge management, except that a letter relating to a subpoena commanding appearance or production at a trial or hearing shall be directed by the clerk to the justice or judge presiding at such trial or hearing. The clerk shall inform the serving party of the manner, date, and time of the ~~hearing~~ in-person, video, or telephonic conference to address the objection or compliance deficiency, if any.

(E) The serving party shall provide prompt written notice of the ~~hearing~~ in-person, video, or telephonic conference to the person or

entity subject to the subpoena and to all other parties to the action as provided in Rule 5(b). If the ~~hearing~~ conference is to be conducted by telephone conference or video conference, the serving party shall connect all participants and shall initiate the telephone or video conference call to the court.

(h) Enforcement of a Subpoena. The procedure in this subdivision to compel compliance with a duly served subpoena is an alternative to contempt proceedings under subparagraph (i)(1) of this rule and Rule 66, which may be initiated by the serving party instead. No written motion other than a motion for contempt shall be filed seeking enforcement of a subpoena without prior approval of the court.

(1) *Alternative Enforcement Method*. To compel compliance with a duly served subpoena when a person or entity has failed to obey and has not objected to the subpoena pursuant to subparagraph (g) of this rule, the serving party may, within a reasonable time after the date for compliance with the subpoena or the receipt of an insufficient response, whichever is earlier,

(A) serve a letter on the subject of the subpoena demanding compliance; and

(B) make a good-faith effort to confer in person or by telephone to attempt to obtain compliance by agreement.

(2) *Court Involvement*. If the compliance deficiency is not resolved by agreement, then the person or entity subject to the subpoena, the serving party, or any other party to the action may file a letter with the clerk of the court in which the action is pending requesting ~~a telephone conference or hearing~~ an in-person, video, or telephonic conference with a justice or judge.

(A) The letter shall identify the title of the action, the name of the court in which it is pending, and its civil action number; identify the particular appearance, production, or inspection commanded for which enforcement is sought; state the basis for enforcement and relief sought without argument or citation; and attach a copy of the subpoena at issue.

(B) The letter shall constitute a representation to the court, subject to Rule 11, that the required conference has taken place, but without success, or that a good faith effort to resolve the compliance deficiency has been attempted unsuccessfully.

(C) The letter shall be served by delivering a copy to the person subject to the subpoena and all parties to the action as provided in Rule 5(b).

(D) The clerk shall direct the letter to the justice or judge who has been specially assigned to hear the action, or to any available justice or judge if the action has not been specially assigned or subject to single justice or judge management, except that a letter relating to a subpoena commanding appearance or production at a trial or hearing shall be directed by the clerk to the justice or judge presiding at such trial or hearing. The clerk shall inform the serving party of the manner, date, and time of the ~~hearing~~ in-person, video, or telephonic conference to address the ~~objection or~~ compliance deficiency, if any.

(E) The serving party shall provide prompt written notice of the ~~hearing~~ in-person, video, or telephonic conference to the person or entity subject to the subpoena and to all other parties to the action as provided in Rule 5(b). If the ~~hearing~~ conference is to be conducted by telephone conference or video conference, the serving party shall connect all participants and shall initiate the telephone or video conference call to the court.

(i) Court Action on Objection or Enforcement Letter. A justice or judge may issue an order on the basis of a letter filed pursuant to paragraph (g)(2) of this rule after conference. A justice or judge may issue an order on the basis of a letter filed pursuant to paragraph (h)(2) of this rule with or without a ~~hearing or telephone~~ conference, at the court's discretion.

(1) *Enforce*. If warranted, the justice or judge may order compliance pursuant to the terms specified in the subpoena.

(2) *Quash or Modify*. The justice or judge may quash or modify the subpoena in its discretion if it

(A) fails to allow a reasonable time for compliance;

(B) requires a resident of this state to attend a deposition outside the county wherein that person resides and to travel a distance of more than 150 miles one way from that person's residence;

(C) requires a nonresident of the state to attend a deposition outside the county wherein that person is served with a subpoena and to travel a distance of more than 150 miles one way from the place of service;

(D) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(E) subjects a person or entity to undue burden in complying with the subpoena.

(3) *Enforce with Protective Conditions*. If a subpoena

(A) requires disclosure of a trade secret or other confidential research, development, or commercial information;

(B) requires the testimony, documents, tangible things, or information of an expert witness who was not retained by a party to testify and that resulted from the expert's study, examination, or analysis performed other than at the request of a party and that do not describe events, occurrences, or facts in dispute;

(C) requires a resident of this state who is not a party to the action or an officer of a party to the action to incur substantial expense to attend trial outside the county wherein that person resides and to travel a distance of more than 150 miles one way from that person's residence; or

(D) requires a nonresident of the state who is not a party to the action or an officer of a party to the action to incur substantial expense to attend trial outside the county wherein that person is served with a subpoena and to travel a distance of more than 150 miles one way from the place of service, the justice or judge may order appearance or production upon protective conditions, but appearance or production upon protective conditions may be ordered only if the serving party (i) proves a substantial need for the testimony, inspection, documents, or tangible things that cannot otherwise be satisfied without undue hardship, and (ii) in appropriate circumstances, pays reasonable compensation to the person or entity served with the subpoena, which in the case of an expert witness is agreed by the expert witness or approved by the court.

(4) *Motions*. If the issues are not decided at the conference, the justice or judge may order a written motion and supporting memoranda to be filed under Rule 7 and may make such orders as are necessary to narrow or dispose of the dispute.

(i) Contempt and Sanctions.

(1) In the absence of an objection under subparagraph (g) of this rule, ~~F~~failure by any person or entity to obey a duly served subpoena may be deemed contempt of the court in the county or district where the action is

pending. Punishment for contempt under this paragraph shall be in accordance with Rule 66 and 16 M.R.S. § 102. Alternatively, the serving party may seek to enforce a subpoena pursuant to subdivision (h) of this rule.

(2) The court may impose an appropriate sanction upon a party, attorney, person, or entity in breach of the duties set forth in this rule, which may include, but is not limited to, lost earnings, reasonable attorney's fees, and other reasonable expenses incurred in seeking enforcement of the subpoena or protection from it.

HARDY WOLF & DOWNING
INJURY LAWYERS

William P. Hardy
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Maine's Personal Injury Lawyers **1-800-INJURED ·**

October 4, 2018

Matthew Pollack, Esq.
Executive Clerk
Maine Supreme Judicial Court
205 Newbury St. #139
Portland, ME 04101-0368

VIA EMAIL AND USPS

RE: Comments on proposed rules changes included in the proposed Civil Justice Reform for Maine's Courts, from Hardy Wolf & Downing, P.A. of Lewiston, Maine.

Dear Mr. Pollack:

If there is one theme in our observations, it is this: the proposed rules limit the time available for litigating cases while adding administrative obstacles that will slow litigation and increase costs for parties and the Courts.

Based upon our understanding of the "Track" system, we estimate approximately 75% of the cases in our firm will fall under "Track B", the other 25% in "Track C." Generally speaking we oppose any of the proposed limits on discovery in the "Track C" cases. Our specific comments are below:

1. We do not support proposed **Rule 16B** which shortens the deadline for notifying the Court and completing ADR; and which removes the mechanism by which the parties can enlarge the deadline once for 60-days upon agreement. HWD works cases aggressively but is nevertheless frequently in the position of requesting an enlargement of time for conducting ADR, usually because of delays associated with scheduling depositions. By truncating deadlines and eliminating the parties' ability to enlarge the deadlines by agreement, these proposals will increase motion practice and judicial involvement, while diminishing the parties' ability to resolve case-specific scheduling obstacles by themselves.

We support the proposal to raise the damages threshold under which a plaintiff can request an exemption from ADR, from $30,000 to $50,000 (see 16B (B)(4)).

2. **Rule 26A Automatic Disclosure:**

We generally support some basic automatic disclosures, but do not support the length of time proposed by the Court for these disclosures.

26A(a)(1)(A) requires disclosure of the name, address, and telephone number of each person likely to have discoverable information that the disclosing party may use to support its claims or defenses. Presumably, this proposal is intended to soften the impact of presumptive discovery limits established by proposed Rule 26(B) but it falls short because it does not address witnesses known to the disclosing party who have information which is damaging to the disclosing party (which is precisely the information that discovery would otherwise address as one of 30 interrogatories). Parties will still need to make discovery requests oriented towards discovering the identity of those witnesses known to the disclosing party which the disclosing party does not intend to use to support its claims or defenses – which means, at least for this example, that the automatic disclosure does not compensate for 20-fewer interrogatories, no admissions, and limited RPDs.

26(A)(a)(1)(B). We propose a five (5) year requirement versus ten (10). A requirement that plaintiffs provide 10-years of pre-DOI records conflicts with the more general rule that discovery be limited to those areas that are reasonably calculated to lead to discoverable information. Medically speaking, information contained in a medical record from 10-years pre-DOI that is not referenced in records from 5-years pre-DOI, offers very little in terms of establishing the plaintiff's pre-DOI baseline. On the other hand, it is very likely (if not inevitable) that disclosure of 10-years pre-DOI records will expose highly personal and potentially embarrassing details that have nothing to do with the issues in dispute. The benefits offered by this proposal—namely, reducing lead-time associated with discovery that might theoretically contain relevant information—are outweighed by the burdens it imposes disproportionately on plaintiffs. An analogy to the business setting—for example, a rule which required the automatic disclosure of sensitive business records for 10-years regardless

of their relevance—would seem unreasonable. The same rationale applies to the cases involving personal injury.

We feel that 5 years of pre-accident records is more than enough to establish a baseline and is sufficient to open the door for more remote medical history depending upon the contents of the 5 years of pre-DOI records.

Granted, 26(A)(a)(2)(D) provides a mechanism by which the plaintiff's lawyer can submit, on court-approved forms, a motion for protection from disclosure and an affidavit explaining the need for protection. But this approach is inconsistent with the dispute-resolution mechanism created by Rule 7(b)(1), which saves judicial resources by delaying motion practice until absolutely necessary, reserving control to the parties who are in the best position to resolve disputes. The proposed rule puts the cart before the horse by requiring broad disclosures of information which may or may not be relevant, and by requiring judicial intervention in order to avoid those disclosures before it is clear that there is a dispute.

The better approach would combine our historical practices with the new Rule 7(b)(1) dispute resolution mechanism. Plaintiff should produce a limited set of medical records which are calculated to contain relevant information about the injury in question. 5-years pre-DOI accomplishes that. If those records contain evidence of a more remote history of relevant problems, the parties can discuss more expansive disclosures (i.e., 10 or 15 years pre-DOI records depending on the injury and medical history). If the parties dispute the extent to which records justify more expansive disclosures, the parties should then—and only then—involve the Court. This approach strikes the right balance between necessary discovery and privacy while minimizing unnecessary costs on the judiciary.

The same observations apply to **26(A)(2)(C).**

3. We do not disagree with the 26B discovery limitations in concept – but we strongly object to the means by which that concept is effectuated in these proposals.

<u>Requests for admission</u> are an important tool used by both sides to streamline litigation and identify issues of contention and should not be effectively eliminated.

Certainly, there should be limits on the number of admissions requested – 500 is too many – but to eliminate them entirely except as to the genuineness of documents per proposed **Rule 36**—is to deprive litigants of a necessary tool for streamlining issues and confirming that artfully-drafted discovery responses have addressed the substance of discovery requests. For example, admissions are highly effective at narrowing ambiguous discovery responses by forcing a party to state—one way or the other—whether that party has provided all of the information requested in a given RPD or interrogatory. Admissions are a self-help mechanism for testing the veracity and completeness of discovery responses. Without that mechanism, parties will require judicial involvement far more regularly, in order to determine the sufficiency, directness, and completeness of discovery responses.

Admissions allow us to streamline discovery by eliminating issues that might otherwise be the subject of an RPD or interrogatory. If 26(B) is going to limit the number of interrogatories and RPDs available in discovery, it should not also deprive parties of their most effective tool for reducing unnecessary discovery.

By way of example: Our practice is to send requests for admissions of critical facts and disclosures set forth in responses to interrogatories and requests for production. This has resulted in obtaining information we would otherwise not know about. Lay people can be a bit less circumspect responding to interrogatories than are attorneys when addressing requests for admissions. We have found that when faced with the request for admissions, especially in cases involving corporate clients, the necessity of signing a document under oath as to the completeness of records has resulted in previously unproduced information and facts being produced.

In one notable case against a corporate defendant, a critical material fact was provided through Defendant's answers to interrogatories. A follow-up request for admission confirming completeness of this answer was submitted and in response to that Request, the defendant supplemented its interrogatory answer with information diametrically opposed to their initial response. We brought this to the attention of Justice Kennedy of Androscoggin County Superior Court. Justice Kennedy rightfully assumed an innocent mistake but chastised the defendant because it was regarding a critical material fact. We submitted a second request for admissions to make sure we now had complete information. The defendant then provided additional significant information that it had not previously produced. This was brought to the attention of Justice Kennedy who penalized the corporate defendant significantly for what became clear was either willful neglect in their response or outright deceit.

Admissions allow us to streamline discovery by eliminating issues that might otherwise be the subject of an RPD or interrogatory. We do not think litigants typically lie, but we do think requests for admissions result in a more careful ascertainment of facts and ultimately streamline many issues ahead of trial. If 26(B) is going to limit the number of interrogatories and RPDs available in discovery, it should not also deprive parties of their most effective tool for reducing unnecessary discovery.

Requests for Admissions focuses triable issues and ultimately saves many hours of trial time. The elimination of Requests for Admissions is a real mistake.

4. **Rule 26(B)** provides parties with a mechanism for expanding the presumptive discovery limits if the party seeking discovery can establish that the requested discovery is proportional to the needs of the case. But again, this approach seems to put the cart before the horse, depriving the parties of sufficient autonomy to resolve discovery issues without involving the Court and imposing a premature and unnecessary administrative burden on parties and the courts by requiring judicial involvement for issues that might otherwise be resolved under the existing 26(g) system, or the proposed 7(b)(1) system.

By requiring judicial involvement in order to enlarge the presumptive discovery limits, the proposed rules will slow the exchange of discovery which—in the context of truncated deadlines—will cause a litigation traffic-jam necessitating motions to enlarge deadlines (which motions—per the new rules—will be considered disfavored as an exception to the rule).

5. We support proposed **Rule 7(b)(1)** which sets forth a unified mechanism for addressing disputes, whether those disputes arise from subpoenas, discovery, scheduling order modifications, etc.. The rule encourages parties to resolve issues without involving the Court, which is a good thing for judicial economy, speeds litigation, and for tailoring specific resolutions to unique problems. We would like to see this theme carried forward in other aspects of these proposals—for example, at 26(A)(2)(B) and 26(B)—which require greater judicial involvement and which diminish the parties' autonomy for finding expeditious case-specific solutions to case-specific disputes.

6. We do endorse **Rule 30(e)**'s limitation on the maximum time for depositions, from 8-hours to 6-hours.

7. We do endorse **Rule 38's** amendment which limits jury trials unless they are requested promptly after the commencement of suit.

8. The proposed changes to **Rule 47(f)(2)-(4)** are confusing. Under that rule, a judge may approve post-service juror contact information disclosure as authorized by law; but then prohibits persons from directly or indirectly contacting any juror (apparently even post-service jurors) for any reason. This rule would seemingly permit us to obtain post-service juror information for purposes of seeking post-trial feedback, but prohibit us from actually using it to contact jurors. We would suggest an amendment to 39 (f)(4)(A) which would prohibit persons from using the juror information to: "directly or indirectly contact, or cause to be contacted, **any prospective juror or jurors presently serving** by any means, including by electronic or social media, **but not as to post-service jurors contemplated by the Court's order under 39(f)(1).**

9. We strongly oppose proposed **Rule 56(L)** which appears to replace the rule currently identified as 56(f). It is not infrequent for parties to exploit the procedural posture of a case when moving for summary judgment – for example, by moving for summary judgment before substantive discovery is completed or where discovery has been delayed in anticipation of mediation. Currently, the law in Maine requires that discovery be sufficiently completed under *Bay View Bank, N.A. v. The Highland Golf Mortgagees Realty Tr.*, 2002 ME 178, 814 A.2d 449 before a motion for summary judgment is appropriate. Under the proposed rule, a party could move for summary judgment very early in the discovery process and the opposing party will be required to show "extraordinary circumstances," at the discretion of the Court, in order to survive summary judgment. In making this change, the Rules will incite parties to move for summary judgment before meaningful discovery is completed, while simultaneously imposing a burden upon the party opposing summary judgment to establish "extraordinary circumstances" where none exist beyond the moving party's premature motion for summary judgment. Such a rule will disproportionately burden plaintiffs in personal injury cases insofar as summary judgment is often sought by defendants, and almost never by personal injury plaintiffs.

Thank you for your consideration.

Very Truly Yours,

/s/Christian J. Lewis

Christian J. Lewis, Esq.
On behalf of Hardy Wolf & Downing, P.A., Lewiston, ME.

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October 4, 2018

Matt Pollack, Esquire, Clerk
Supreme Judicial Court
205 Newbury Street,
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04101-4125

VIA E-MAIL

Re: Proposed Amendments to M.R.Civ.P.

Dear Matt:

I wanted to offer a number of comments relating to the proposed revisions of the M.R.Civ.P. in connection with the Civil Reform project. They are as follows:

1. Proposed Rule 16B(b)(4) exempts from ADR actions where the Plaintiff requests exemption and certifies that the likely recovery of damages will not exceed $50,000.00. This would typically exempt an action where the Plaintiff is seeking an injunction. I would be surprised to think it was intended to exempt all injunction cases from ADR.

2. Rule 36(a) I think that this acute narrowing of the scope of permissible requested admissions is not salutary. In litigation involving multiple counts and multiple causes of action, obtaining admissions as to facts and as to the application of law to facts can be very helpful, and serving such a request in advance of ADR can sometimes help the neutral get a party to focus upon what is really not going to be a matter in issue.

3. The lack of attention to Rule 80A and real estate disputes in general is, I think a missed opportunity to offer some efficiency to the system. I have

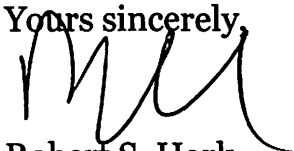
been involved with a great deal of real estate litigation, and it seems to me that it often utilizes too many of the court system's resources.

I suggest at a minimum that in every real estate dispute that is based in whole or in part upon recorded instruments, each party should be required by rule to file copies of the deeds in their chains of title, and that these should be admissible without certification from the Registry both as evidence at trial, in summary judgment proceedings, and in proceedings wherein a party seeks injunctive relief.

While I don't think that real estate disputes require their own special track, quite possibly they could benefit from being included in the Rule 16 definition of Track C cases, if only because Track C cases will have an initial case management conference under Rule 16(b)(2)(B). This would give the court an early opportunity to understand whether the case is one primarily involving construction of recorded instruments (possibly capable of resolution on summary judgment) or whether it is fact intensive (adverse possession or prescriptive easement), and to establish a scheduling order that responds appropriately to the type of dispute.

Thanks.

Yours sincerely,



Robert S. Hark

Ticket Details

Status	Priority	Source	Type
Open	Low	Email	**Agent** Joel.biron

by **David L. Herzer** on **Thu, Sep 20 at 11:01 AM** via **Email**

Civil Rules Changes Commentary

My observations or questions about the proposed Rules changes:

16B(h)(1). The requirement now that the ADR Report must contain "all of the terms of the settlement" which, once filed with the Court, become public record contradicts the other confidentiality requirements in the Rule and defeats one of the important motivations for parties to settle in the first place: the ability to control the publication of the settlement's terms. One of its selling points of ADR uttered to parties by mediators thousands of times is that ADR is the last, best chance for them to have some say in the outcome of their dispute. Making it confidential is a significant element of that "say."

47(f)(4)(A). I take the prohibition on "indirectly" contacting a juror by social media NOT to mean that we are prohibited from looking at a publicly published social media pages or profiles of a juror. That does not involve contact with the juror, who does not even know we are looking. Or does the Court intend to prohibit doing that kind of research on jurors?

Thank you.

David L. Herzer, Jr., Esquire

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October 5, 2018

VIA EMAIL
Matthew Pollack, Executive Clerk
Maine Supreme Judicial Court
205 Newbury Street Room 139
Portland, ME 04112-0368
lawcourt.clerk@courts.maine.gov

Re: Comment on Proposed Amendments to Rule 80B

Dear Mr. Pollack:

On behalf of municipal law practitioners at the law firm of Jensen Baird Gardner & Henry, I am submitting these comments in response to your September 5, 2018 Notice of Opportunity for Comment regarding the proposed implementation of civil justice reform. We appreciate the opportunity to offer these comments, which are focused on two of the proposed changes to Rule 80B.

First, the proposed amendments would change the time period within which to file an appeal seeking review of a governmental action. The existing rule provides a default time period of "30 days after notice of any action or refusal to act of which review is sought," if no other time limit is specified by statute. *See* M.R. Civ. P. 80B(b). The proposed amendment would reduce the appeal period to 28 days. We believe this change would be problematic for a few reasons. The 30-day time frame is well-established and is engrained in the minds of most municipal practitioners and litigants. In addition, most municipal ordinances reference the current Rule 80B and provide for a period of 30 days to appeal a decision (other than board of appeals decisions, which have a 45-day appeal period by statute). All of those municipalities would need to amend their ordinances as a result of this rule change. We also note that the new time period would be inconsistent with 30-A M.R.S. § 4482-A(1) (providing that land use appeals must be filed "within 30 days of the date of the vote on the final decision") and Rule 80C, which references the Maine APA for a 30-day appeal period. *See* 5 M.R.S. § 11002. These discrepancies could lead to further unwarranted confusion.

Second, and perhaps more significantly, the proposed amendments would modify Rule 80B(e), which governs the preparation of the administrative record. The existing rule requires the plaintiff to prepare and file the record with the Superior Court, but if revised as proposed, that financial and administrative burden would be shifted to the municipality in all cases. We respectfully oppose this proposed change for the following reasons:

- The preparation of an administrative record at the local level is often time consuming and expensive, especially when a transcript of the relevant proceedings must be prepared or significant copying is needed. Unlike state agencies, most municipalities do not have extensive staff or in-house attorneys to assist in the review and preparation of the administrative record. Staff frequently will not have the training or expertise to determine what must be included in the administrative record, including which ordinance provisions are required. The proposed amendments would require municipalities to expend scarce personnel resources and engage their outside attorneys to prepare the administrative records. Moreover, there is no provision in the rule requiring the plaintiff to reimburse the municipality for expenses incurred in the preparation of the record, nor does it establish a procedure for recovering these costs if the plaintiff refuses to reimburse the municipality.

- The legislature recently enacted Title 30-A, Chapter 190, which governs judicial review of municipal land use decisions. For "significant municipal land use decisions" involving certain large-scale developments, the statute requires the municipality to file the administrative record with the Superior Court. *See* 30-A M.R.S. § 4482(2). In practice, we have found that the preparation of the record by the municipality in these types of cases has not resulted in more efficient litigation. Frequently, these matters are considered by local boards without participation by the municipal attorney, and municipalities are not put on notice that they are responsible for the submission of the record or the 35-day deadline for filing. In the ordinary course, municipalities do not notify their legal counsel of appeals until they have been served with the complaint, which may occur close to or even after the statutory deadline for filing the administrative record. Finally, while the statute provides for reimbursement of the cost of producing the record in this type of appeal, it does not address whether a municipality can recover its legal costs incurred in compiling the record and coordinating with the other parties in determining the final contents of the record. These issues should be clarified before adopting further amendments to Rule 80B that could create more confusion for parties.

- Municipalities are often caught in the middle of disputes between feuding neighbors, and therefore elect not to incur the expense of participating in those appeals. However, the proposed amendments would require municipalities to become embroiled in that category of disputes and expend resources by having to prepare the administrative record.

- In terms of timing, the plaintiff only has 40 days after the complaint is filed to submit its brief under the rule (42 days under the proposed amendment), but if there is any delay in preparing the record at the municipal level, the plaintiff would be at a disadvantage in

terms of preparing a brief. This is unlike Rule 80C, in which the briefing schedule is triggered by the date when the governmental agency files the administrative record with the court. The existing rule makes sense because it places the responsibility for compiling the record on the party that needs the record first, and avoids the administrative delays that often occur under Rule 80C.

- Finally, our experience is that one of the most common causes of delay related to the administrative record is the preparation of a transcript of the proceedings when one is requested by a party. This timing issue will not be resolved by shifting the burden of producing the record to a defendant municipality.

We appreciate the opportunity to provide these written comments in response to the Notice of Opportunity for Comment, and hope that they will assist in the decision-making process. We are pleased to respond to any questions that the Court might have regarding these comments.

Sincerely,

Mark A. Bower

MAB/gw

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October 1, 2018

Matt Pollack, Esq.
Clerk of the Law Court and
Reporter of Decisions
Maine Supreme Judicial Court
205 Newbury Street, Room 139
Portland, ME 04112-0368

Dear Mr. Pollack:

I write to express concern regarding certain of the court's Proposed Amendments to the Maine Rules of Civil Procedure.

Rule 16B.

I have an active civil practice and represent parties at mediations on a regular basis. In addition, I act as mediator in approximately 25 to 30 cases each year. I believe reducing the time for noticing and conducting mediation is unrealistic and counterproductive. In order for mediation to be meaningful, the defendants must have the opportunity to conduct written discovery as well as the deposition of at least the plaintiff, and then to report on this activity to any insurance carrier involved for its evaluation process. It is often difficult to complete these activities within the 120 days provided by the current Rule.

Plaintiffs often have difficulty in obtaining information from third-parties asserting lien, subrogation, or reimbursement claims and negotiating resolution of these claims prior to mediation under the present deadline. Unless discovery, evaluation, and negotiation of these claims can be completed prior to mediation, the mediation process is at least made problematic, and in many cases doomed to failure. Pressure under the present Rule is relieved somewhat by the automatic extension of time to 180 days to complete the ADR process. Elimination of that automatic extension provision is also likely to create impediments to early resolution of litigation.

I anticipate problems with the proposed requirement that claims adjusters have "full settlement authority." That term is not defined, and some may construe it to require authority up to the policy limits which is unrealistic in many cases. "Reasonable settlement authority" under the circumstances of the case would be a more realistic requirement.

Requiring notice to the court in a public filing including "all the terms of the settlement" seems unnecessary. I suppose this is meant to aid the court in the event of a motion to enforce settlement achieved at mediation. However, virtually every mediation is concluded with a written agreement signed by all parties setting forth the terms of the settlement. Requiring the terms to be filed in court may be an impediment to settlement by parties who wish to keep the terms of a settlement confidential. As an example, parties in a case settled recently involving a dispute between the sister and daughter of a decedent would not want the terms of the settlement to be available to the public. I also question the need for sanctions to be imposed if the neutral does not file a report with the court within 105 days.

Rule 26, 30(a) and 30(b).

Reducing the time for discovery in Track B cases to six months will also likely create scheduling difficulties. Defendants often do not know what depositions may be necessary until written discovery responses are received from a plaintiff, and possibly not until the plaintiff has been deposed. In practice in this state, it is common for depositions to be taken by agreement of the parties even after the discovery deadline so long as there is no interference with a trial date. However, it appears this practice will be eliminated by Rule 30(a) requiring leave of court for discovery after the deadline. This requirement may erode collegiality among members of the bar, and will likely increase the burden on the clerks and trial judges to some extent if frequent motions to conduct discovery after the discovery deadline by agreement of the parties are required. Scheduling of depositions is frequently delayed awaiting receipt of pre- and post-accident medical records and, on occasion, employment records. I am not confident that the mandatory initial disclosures will cure this problem.

As a practical matter, I do not believe there is any problem with the present limit of five depositions and I do not believe reducing the number from five to four in Track B cases will have any effect of reducing either cost or delay.

Rule 33. In my opinion, reducing the number of interrogatories in Track B cases from 30 to 10 will increase, not decrease, the cost and delay in most civil cases. Interrogatories are an inexpensive method of obtaining facts necessary for the prosecution or defense of civil litigation. As the court is aware, interrogatories can obtain information which may not be readily available at the deposition of a party. It may take some research and investigation to prepare proper interrogatory answers, while there is no such requirement that a deponent undertake any such investigation. In my practice, I do not believe it is burdensome for either plaintiffs or defendants to respond to written interrogatories. Without time for reflection and investigation, it is likely there will be some questions posed at depositions which the deponent reasonably could not be expected to answer in the same detail the deponent could provide in answers to interrogatories. This could prompt the adjournment of the deposition to permit the deponent to obtain the relevant and discoverable information in question. That exercise, of course, would increase both the cost and delay.

Rule 34. I do not believe it will be productive to limit document requests to fifteen in number in Track B cases. In most cases document requests from either the plaintiff or defendant in civil litigation are fairly routine and not burdensome. This proposed amendment limiting the number of requests invites the former annoying practice of attorneys quibbling over whether a document request includes 15 or more than 15 requests. If document requests are oppressive or unreasonable, the court, of course, under the present Rules has the authority to limit those requests.

Rule 36. The proposal to limit requests for admission only to the genuineness of documents is puzzling. I cannot think of an instance in my practice where genuineness or authenticity of documents has been an issue. In my experience I have only seen one set of requests for admissions that was unreasonable. This was in a case involving an automobile accident where liability was admitted and 100 requests for admission were filed. Under the circumstances, the request was unreasonable and out of proportion to the circumstances of the case. However, rather than involve the court in a discovery dispute, the requests were simply responded to mostly without objection. That example is a gross deviation from usual practice and, if requests were deemed overly burdensome, a party could seek relief from the court even under the existing Rules. In my experience, requests for admission are more often used by plaintiffs than defendants for such purposes as establishing the reasonableness, necessity, and causation of medical bills. I am unaware of any good reason to limit such requests.

I appreciate the court's consideration on these comments.

Very truly yours,

DAVID C. KING
DCK/dls

KELLY, REMMEL & ZIMMERMAN
Attorneys at Law

LAURI BOXER-MACOMBER
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October 5, 2018

Via Hand Delivery
Mr. Matthew Pollack, Esq.
Executive Clerk
Maine Supreme Judicial Court
205 Newbury Street, Room 139
Portland, Maine 04112-0368

Via Email
lawcourt.clerk@courts.maine.gov

Re: Kelly, Remmel & Zimmerman's Comments on the Proposed Implementation of Civil Justice Reform through Differentiated Case Management

Dear Mr. Pollack:

Enclosed please find the above-referenced comments for filing with the Maine Supreme Judicial Court. The comments are being submitted on behalf of the law firm of Kelly, Remmel & Zimmerman. Our firm's address and telephone number are found below. Thank you in advance for bringing this document to the attention of the Court.

Best regards,

Lauri Boxer-Macomber
for Kelly, Remmel & Zimmerman
LBoxer@krz.com

INTRODUCTION

Kelly, Remmel & Zimmerman appreciates the opportunity to comment on the Maine Supreme Judicial Court's proposed implementation of "Civil Justice Reform for Maine Courts," which was noticed and released for review on September 5, 2018. We recognize that the Advisory Committee on the Maine Rules of Civil Procedure and the drafters of the proposed amended rules and supporting documents have invested significant time and resources on this effort.

Given that the proposed changes are voluminous and will have significant and lasting impacts on the practice of law in Maine and our citizens' ability to access justice for years to come, it would be helpful for the Court to enlarge the time for public comment on the proposed amendments to the Maine Rules of Civil Procedure. This would allow the Advisory Committee on Civil Rules to identify and elaborate upon the various reports and other research it relied upon in drafting the proposed rules so as to provide the bar and public a greater understanding of the rationale for the various rule amendments. While there are some references in the Summary to the proposed amendments to pilot projects and other states, there are no specific citations or web links to reports and research so as to facilitate thoughtful responses. For example, it would be useful for the bar and public to have easier access (via links, pdfs, etc.) to information about the courts that have already implemented the track systems, expansive automatic disclosures, presumptively low numbers of interrogatories and requests for production, limitations on the types of requests for admission that may be served, requirements regarding disclosure of the terms of a settlement to the court, and new summary judgment process prescribed in the new proposed rules.[1] In addition, it would be equally useful to have access to the studies on courts where similar changes have been adopted and in place for several years.

Further, in light of the way that this proposed civil justice reform will impact the State for years to come, there is additional concern that the general public may have never received notice of the proposed reform and may still be unaware of what is taking place and how it may impact them. While Maine Courts require public notices to be published in newspapers on matters of arguably lesser significance, there appears to have been limited, or maybe even no, media coverage on this significant proposed overhaul of the civil justice system.

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[1] For example, the Advisory Committee represented that "[n]ationwide 75% of civil judgments are less than $5,200" as support for the problem that civil process costs too much and takes too long. Civil Justice Reform Summary at 1. This data presumably comes from the 2016 recommendations to the Conference of Chief Justices by the Civil Justice Improvements Committee. National Center for State Courts, *Call to Action: Achieving Civil Justice For All,* available at https://www.ncsc.org/~/media/microsites/files/civil-justice/ncsc-cji-report-web.ashx (last visited Oct. 1, 2018). It may be important for the bar and public to understand that the 75% figure is derived from a 2012-2013 dataset extracted from 10 urban counties, none of which were located in Maine, and reflects only 5% of civil cases nationally. *Id.* at 8 (referencing *The Landscape of Civil Litigation in State Courts*, available at https://www.ncsc.org/~/media/Files/PDF/Research/CivilJusticeReport-2015.ashx (last visited Oct. 2, 2018). Allowing for additional time to comment on the Proposed Rules would give the Committee an opportunity to make these reports more readily available to the bar and public.

Accordingly, before turning to substantive concerns about the proposed amendments, the Court is urged to enlarge the comment period through the end of 2018, delay the public hearing on the proposed changes to February 2019, and further and more widely distribute and disseminate the proposed rules to those who will be impacted the most.

OVERVIEW OF GENERAL CONCERNS ABOUT THE PROPOSED REFORM

One of the pillars of our United States judicial system is that all citizens have access to justice. The proposed civil justice reform in Maine, while well-intended, may actually unintentionally threaten this foundational principal in a number of ways, including by slowing down fair and equal access to justice and increasing the costs and administrative burdens on litigants, their representatives, trial courts and court administration.

It is critical that the bar and the Court openly recognize and keep in the forefront that litigants are citizens whose cases are of significant importance to them. While many of the rule changes may seem innocuous at first glance, the limitations on discovery, likelihood of increased motion practice, and the invitation to impose sanctions presented by these amendments all work against the citizen's right to have their day in court.

While the concepts of differentiated case management and proportionality that provide the infrastructure for the proposed amendments are laudable and should be a part of any civil justice reform, the proposed rules, as presently written, actually end up imposing upon litigants the very same "one-size-fits-all" approach that the drafters have acknowledged is illogical, inefficient and costly. In other words, the creation of multiple tracks does not address the unique needs presented by each case, as each track still employs a "one-size-fits-all" approach to litigation that may only be altered by exception.

Further, under the proposed rules, litigants will be held to strict initial disclosure requirements (some of which are overly broad, unduly burdensome and, by default, impose on their right to privacy and threaten their families, jobs and livelihoods). In addition, parties will be offered limited and fewer opportunities to narrow the issues presented by their cases before trial, which will increase the process burdens and costs for them, their representatives and the court. More specifically, if the proposed rules were to be adopted it is anticipated that the average number of requests for discovery conferences and hearings with the court will rise exponentially, beginning with requests for conferences and hearings on how a case is characterized, what track it should be on, the appropriateness of the initial disclosure mandates, and the deadlines set forth in the scheduling order and ending with requests and motions to the court to alter the summary judgment and pre-trial processes.

In addition, throughout the discovery process of most cases, the court and its clerks will likely be subjected to requests, motions and oppositions from parties to alter the number of

depositions, interrogatories, requests for production and the types of requests for admission that may be sought, as the "one-size-fits-all" default provisions set forth in the proposed rules will likely be debated by the parties and insufficient for most plaintiffs who need decent discovery to make informed decisions about settlement, alternative dispute resolution and/or trial. Regular involvement of the court will be necessary to manage requests for amendments, exemptions and alterations and, if the judiciary does not have the time or resources to manage the requests, it is anticipated that access to justice will be further delayed and/or entirely thwarted by the reform.

There is also a very real concern that certain parties such as well-funded or insurance defense-funded litigants will have the wherewithal to use the rules as procedural tools to seek limitations on witnesses and evidence. Likewise, there is a concern that the newly imposed limitations on discovery will have minimal consequences for these parties (as they have the resources and capacity to obtain informal discovery through private investigators) but significant consequences for those without similar access to funds and resources.

Further, the proposed rule changes indirectly risk limiting access to justice by potentially discouraging attorneys from taking smaller and *pro bono* cases. At the present time, lawyers may choose to represent a client on a contingent basis, even in situations where it is expected in advance that the recovery will not allow the attorney to obtain the attorney's usual hourly rate, in order that a client with a smaller claim will have access to the courts. Should it develop as expected that the rule changes provoke more motion practice and expense, lawyers presently undertaking this type of representation may well reconsider taking on the representation in the future, leading to more *pro se* parties or parties giving up on the court system.[2]

Another concern is that the civil justice reform is partially premised on an increase of civil case filings in Maine courts being a "benefit" for litigants. *See* Civil Justice Reform Summary at 1 (Benefits). While this may have been a positive development in some jurisdictions, it is questionable whether increasing the number cases in Maine courts, which are already having difficulties ensuring due process and access to justice, would be a benefit for the citizens of our State.

Finally, it should be noted that many of the proposed rule changes do not appear to be the most effective method of addressing the issues that are significant problems in Maine. In general, the scheduling orders currently issued by the Superior Court work well and, when the need arises, counsel often work together to alter deadlines to accommodate the parties. Time to

[2] A similar rethinking occurred among practitioners who previously prepared Chapter 7 bankruptcy filings for distressed clients as a part of their general practices. This work was undertaken to fill a need, even though the flat fees usually charged by those attorneys would not fully compensate the attorney's hourly rate. When the new bankruptcy rules were enacted, implementing means testing and other requirements, most practitioners left the area entirely because the cost of preparing and following through on a filing had escalated and the attorneys could no longer justify providing the service. Today, only firms that utilize specialized software and paralegals engage in this work, and the direct attorney-client contact is kept to minimum. As a result, other options such as work-outs and restructuring are not regularly explored.

trial in Maine is also believed to be shorter than many other state court systems, and most Maine lawyers are competent and generally work well within the current rule structure. While there is certainly room for improvement in our rules and the adoption of a system that recognizes the values of proportionality, differentiated case management and early access to information, Kelly, Remmel & Zimmerman respectfully requests the Court to rethink the implications of the proposed rules and consider the more specific comments and suggestions outlined below.

INDIVIDUAL RULE COMMENTS

RULE 3. COMMENCEMENT OF ACTION

It is anticipated that the shorter time periods referenced in the proposed Rule 3 will create undue burdens on litigants, their representatives and the court, unnecessarily increase the number of cases on court dockets, and interfere with the early resolution of cases that often takes place after service or filing, but before an answer is due.

Shortening the court filing time period for a complaint that has been served on a defendant from 20 to 14 days does not take into account administrative delays associated with the return of service paperwork and other delays associated with personal and professional schedules of counsel or staff. Instead, changing the time period to 21 days, consistent with the deadlines associated with many other rules, will make it more likely that the deadline can be met.

Shortening the time period for formally serving a filed complaint on a defendant discourages pre-suit resolution of cases and will likely create unnecessary motion practice before the court. Once suit is filed (but before a complaint is formally served), adjusters and defense counsel are frequently amenable to discussing the case. Time is often needed to exchange information, bring defense counsel up to speed, allow the parties to schedule and conduct ADR with a mediator of choice, obtain settlement authority, and/or finalize settlement documents. This is especially so in more complex cases. By requiring service and an answer earlier, these opportunities for early settlement are unnecessarily decreased.

RULE 7. PLEADINGS ALLOWED: FORM OF REQUESTS AND MOTIONS

As a matter of form and style, the Court may wish to consider having a rule addressing pleadings (Rule 7) and another rule addressing requests motions and other papers (Rule 7A). In the alternative, the Court may wish to substitute a semicolon for the colon between the words allowed and form, as is done in the Federal Rules of Civil Procedure.

With respect to proposed Rule 7(b)(1)(A), so as to avoid delay, it is recommended that the Court impose a deadline within the rules for holding the party conference after one party requests one of another (e.g. no later than seven days after a request from opposing counsel, unless good cause is shown).

In Rule 7(f), the page limits are significantly unrealistic and may ultimately be adverse to a court's need for the parties to fully address the legal issues that may be presented in complex cases. Fourteen pages for dispositive motions is simply not workable and will lead to the parties being unable to fully address complex issues and legal concepts. Shortening the page length requirements for briefs is also anticipated to lead to more motions to extend page limitations, thereby increasing the number of motions that could otherwise be avoided by the Court. It is also possible that shortening the page lengths for memorandums will lead to more exhibits and attachments, thereby defeating the purpose of the amendment.

The Rule 7(h)(4) elimination of the right to respond or oppose a motion for reconsideration unless invited by the court to do so is a concern for at least one practitioner at our firm. While this proposed amendment was likely intended to avoid unnecessary and costly filings, the proposed amendment may have the unintended effect of denying parties the right to be heard and prompting additional motions (e.g. motions to be heard, motions on amended decisions, etc.).

Rule 16. DIFFERENTIATED CASE MANAGEMENT

For those in our firm who handle cases that might potentially fall under Track B, there is a concern that the time frames will deprive litigants of fair and/or due process, increase the financial and administrative burdens on the parties and the court by requiring a number of conferences, requests and motions associated with reassignment and modifications to the scheduling order. Further, as one practitioner in our firm points out, "Who is to say what type of case it is based on notice pleading?" The concerns about Track B's shorter deadlines are multiplied knowing how difficult it is currently to litigate cases with attorneys who have full litigation schedules and are unlikely to be able to accommodate these deadlines.

Similarly, those at our firm who handle cases that may fall under Track C have concerns that the Track C scheduling deadlines are arbitrary and not connected to how these cases generally proceed. Completing discovery, including written discovery, depositions and expert designations, in eight months in a complex case would be difficult to say the least. Further, the outside deadline of eighteen months (which seems more realistic) creates a ten-month window between the close of discovery and trial. The purpose of that ten-month period is unclear to us.

Some members of this firm request the Court to consider whether the procedures for Track C cases should apply to all cases. Why not require the parties and the counsel in all cases, not just Track C cases, to first meet and work together to decide an appropriate scheduling order and plan

of discovery for their case and then either have the Court adopt the agreed-upon plan or assist it with resolution of any pending issues via an initial case management conference? The goal for certain cases may be six months and in others ten or eighteen, but three sets of cookie cutter deadlines for Track A, B and C cases simply makes little sense for the courts, the attorneys, or the parties.

Please also see related and more specific commentary on Rules 26A, 26B, 30, 33, 34 and 36.

Rule 16B. ALTERNATIVE DISPUTE RESOLUTION.

The changes to the timing of ADR under Rule 16B are perceived by us to be too aggressive and ignore that the timing and likelihood of success of ADR is very case specific. We recognize and understand the value in attempting to complete ADR in cases that can be settled before significant resources are spent on discovery, but the reality is that in certain cases (especially, but not solely, complex cases), some meaningful discovery is essential before each party can understand all of the strengths and weaknesses of their case and subsequently educate the mediator on key aspects of both sides, which is necessary to provide the mediator with the ability to move the settlement discussions with substantive issues. Forced early mediation will result in many complex cases passing the mediation phase unsuccessfully only because the parties were not ready to engage.

As a practical matter, there are also procedural barriers to calendaring mediation within a short time period. Given our own caseloads and the caseloads of other busy litigation and mediation firms, it is not always easy to schedule mediation, depositions or other events that are necessary precursors for an effective mediation.

Further, although there are opportunities to request modifications, requiring the parties to make such requests as opposed to allowing them to jointly determine the best time to mediate a case seems contrary to the notions of justice, fairness and efficiency.

The new exception in Rule 16B(b)(4) removing mediation on any case involving $50,000 is also perplexing. Many smaller cases are exactly the ones that should be mediated early. Both parties to a $50,000 case will have incentive to resolve the case early, perhaps even if they do not have all of the facts, because the cost to litigate makes it wise to settle early if possible. The larger cases are less likely to settle early because of the amount of money involved and because they usually involve more complex facts that need to be unearthed.

The Rule 16B(h)(1) mandate that all of the terms of a 16B settlement must be filed with the Court essentially eliminates confidential settlements and would likely result in parties working around the rule by changing the characterization of their ADR process to be something other than a 16B proceeding so as not to have to comply with the rule. Further, even if parties were

not concerned with confidentiality, the seven day requirement for the submission of settlement terms is unrealistic, as often terms take longer to memorialize and finalize settlements.

Finally, it is unclear why the burden to report settlement to the Court is shifted to the plaintiff as it unnecessarily transfers the final litigation costs onto one party's shoulders even though both parties participated in ADR and ultimately resolved the litigation.

Rule 26A. AUTOMATIC INITIAL DISCLOSURES FOLLOWING FILING OF PLEADINGS

Encouraging the open and early exchange of information through initial disclosures is a welcome concept. However, there are some questions and concerns about the scope, nature, fairness and timing of automatic disclosures as provided in the proposed rules.

As an initial matter, it would be helpful to understand why the proposed amendments establish initial disclosures that are broader than those required by the Federal Rules of Civil Procedure, as well as the origin of the proposed disclosure requirements set forth in Rule 26A(a)(1)(C)(i)-(ii) and Rule 26A(a)(2).

In addition, some practitioners at the firm have difficulty appreciating why plaintiffs and defendants are given different dates for initial disclosures in contrast to the well-established practice set forth in the Federal Rules of Civil Procedure where both parties make disclosures on the same date. If realistic deadlines for reasonable initial disclosures are not imposed equally by the court on all parties, it is easy to imagine a situation where some parties provide comprehensive initial disclosures and are disadvantaged when others file motions for enlargements of time, motions for protective orders, and motions for confidentiality orders.

Some practitioners at our firm who practice personal injury law are also perplexed by why the default disclosure requirements for plaintiffs are much more expansive, invasive and onerous then they are for defendants. For example, it is unclear why there are initial disclosures in the proposed rules relating to plaintiff's potential damages, but no proposed initial disclosures about the potentially negligent practices and behavior by defendants that caused those damages. Similarly, personal injury practitioners question why plaintiffs are the only ones who have automatic medical and mental health disclosure requirements. In traffic crash cases, if the Court is going to require initial disclosures from a plaintiff involved in a crash, it should also require the defendant's medical, mental health and vision records for the years immediately prior to and after a crash.

Likewise, it is baffling that only plaintiffs are required to initially disclose all other lawsuits and other claims under Rule 26(a)(2)(D). It is equally important for an injured party to know early in the litigation if defendants were regularly the subject of lawsuits and complaints for similar or

other behavior. Defendants should therefore also be required to initially disclose this information.

One practitioner also recommends coupling the insurance policy disclosure requirements with disclosures of pre-suit statements given by parties and witnesses to insurance companies.

The Rule 26A(a)(2)(B) default ten-year medical disclosure required of plaintiffs claiming bodily injury or emotional distress is also concerning, as it wholly ignores the foundational principle of Rule 26, which only allows for the discovery of information reasonably calculated to lead to the discovery of admissible evidence. Requiring plaintiffs to provide records dating back ten years that might be totally irrelevant, ignores the time, expense and cost of acquiring such records. Further, although exceptions may be sought and authorizations may be provided in lieu of records under the proposed rules, plaintiffs should not have to choose between compromising their privacy or having to file motions to protect themselves from irrelevant disclosures. It is also noteworthy that state rules on medical record retention are believed to only require that adult medical records be kept by hospitals and their subsidiaries for seven years and most plaintiffs are unable to remember all of the places where they have treated over the past ten years. As such, compliance is likely to be difficult and could result in plaintiffs unfairly sanctioned in the event of noncompliance.

Similarly, the fourteen-day-post-treatment motion for protection requirement set forth Rule 26A(a)(2)(D) sets unrealistic expectations and unfair default parameters for the disclosure of plaintiffs' post-filing healthcare information. Under the proposed rule, plaintiffs' lawyers would have to constantly interact with clients about any type of treatment they are receiving, regardless of the relevancy, cost and administrative burdens, and would be required to file motions for protection with the Court even before having a reasonable opportunity to learn of such treatment and review related records.

Rule 26A(a)(1)(C)(ii) is also fraught with dangers. Giving defense counsel direct and automatic access to a plaintiff's employer during litigation is not only an undue invasion of privacy, but it has the potential to result in the loss of a job should an employer conclude it does not want the burden or the costs of supplying records, or even should an employer find fault with an employee being a party to a lawsuit.

In addition to the substantive concerns about what is required to be automatically disclosed under the default rules, our commercial and business litigators who often engage in defense work have pointed out that there is the additional problem that in complex cases with significant e-discovery, it can take months to cull through the documents and get them reviewed and ready to produce. From the perspective of these attorneys, the idea that Rule 26A(b) requires a plaintiff to provide its initial disclosures within 14 days after the answer is filed and that the defendant (who may not have had any lead up to the Complaint and is starting from a standing start) must

provide its initial disclosures within 14 days of service of the plaintiff's disclosures is a significant burden on both the parties and the attorneys.

To the extent that expert disclosures are required as part of the Rule 26A initial disclosures, as is alluded to in proposed Rule 26B(b)(4)(A)(1), this is also concerning from the perspective of both defense and plaintiff's counsel. Often defendants do not have a full understanding of the plaintiff's claim at the start of litigation, much less have an expert to counter it. As such, requiring expert disclosures at this early stage of litigation is unfair. Likewise, from a plaintiff's standpoint, it is unfair to require one party to start disclosing experts well in advance of the other and without having had the opportunity for discovery. The federal approach, where experts are disclosed later, and are staggered, is better.

Finally, there are concerns with Rule 26A(e), which allows for sanctions if a party fails to comply with initial disclosures. This could easily become a field day for those litigants with better funding, who can overwhelm the other side with motions and sanction requests. One practitioner in our firm feels that this rule could result in regular motions in state court similar to *Daubert* motions in federal court.

RULE 26B. GENERAL PROVISIONS GOVERNING DISCOVERY

While recognizing the value of proportionality, there is a concern on the part of some practitioners that the proposed amendments unintentionally created a system where some litigants will have better access to justice than others. In most cases it is expected that the litigants will have differing opinions on how the cases should be valued and litigated. As a result, it is anticipated that the court will regularly see competing motions relating to the presumptive limits relating to the extent of discovery and the time limits for the completion of discovery. As discussed in our Overview, *supra,* these motions are not only expected to cause delay, confusion and hardship for the parties, but will result in undue burdens on their legal representatives and the Court. This is particularly so where the nature of the case or the scope of the parties' claims and defenses change during the course of discovery, which often occurs.

In addition, the people most harmed by the presumptive limits are those who do not have the resources to conduct informal discovery through private investigators and other services, as well as the *pro se* parties who will have a harder time navigating the new rules and meeting their procedural and substantive burdens of proof.

RULE 30. DEPOSITIONS UPON ORAL EXAMINATION

The proposed presumptive deposition limits embodied in proposed Rule 30 are problematic on multiple fronts and should not be adopted by the Court.

Five depositions will almost never be sufficient in complex cases where there are often two or more experts and handfuls of fact witnesses likely to each have key information. If the Court is inclined to implement presumptive limits in complex cases, we suggest that the restrictions not be imposed until after the experts and parties are deposed, at the point when there are likely only a few depositions left for fact witnesses. Adoption of the proposed rules will move us back to the "sporting theory of justice" where parties can hide information and spring it at trial. That is not only uncomfortable for lawyers and a disservice to litigants but it also runs counter to the assumed goal of getting to the truth. The same thing is true of the other presumptive limits. While reducing discovery may seem appealing, these discovery tools are critical to refining complex cases and allowing the parties to fully understand their cases.

With respect to Track B and other cases, limiting the presumptive number of depositions to four also seems unrealistic for similar reasons.

Shortening the permissible length of a deposition from 8 hours to 6 hours is anticipated to make it harder to complete most Rule 30(b)(6) depositions, as well as depositions of difficult witnesses.

RULE 33. INTERROGATORIES TO PARTIES

As with limitations on depositions, limiting interrogatories in both complex and standard track cases makes it more difficult for litigants to discover information that will help narrow issues and get closer to the truth. Further, the proposed amendments will increase the information imbalance between average individuals and well-funded insurance companies and other parties who have the funds and resources to easily acquire information outside of formal discovery.

The presumptive limit of 10 interrogatories for standard track cases appears to be significantly lower than what is permitted in most federal and state courts. It would be helpful to know whether any other jurisdictions have taken this drastic step of reducing the number of permissible interrogatories by two-thirds of what was previously permissible.

RULE 34. PRODUCTION AND INSPECTION OF DOCUMENTS AND THINGS; ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

For the same reasons discussed above, there is concern over the low presumptive limits associated with the requests for production in both Track B and C cases, as well as with the increase in procedural burdens and motions that will follow in most cases as a result of these presumptions.

RULE 36. REQUESTS FOR ADMISSIONS

Limiting the default rule on requests for admission to anything other than the "genuineness of any relevant documents" is a grave error and should not be adopted by the Court. Many times admissions classify issues and eliminate unnecessary trial proofs. To the extent that there are currently problems with Rule 36, it is that the courts do not strictly enforce the rule and parties are able to avoid admitting matters that really should be admitted. In the event that the Court intends to adopt a limitation on the presumptive manner in which requests for admission may be used, we suggest that it expand the presumption to include admissions relating to the authentication of various forms of recordings, not just documents.

RULE 40. ASSIGNMENT OF CASES FOR TRIAL; CONTINUANCES

As a general matter, the provisions contained within proposed Rule 40(c) and (d) and other places within the proposed amended rules that make extensions and continuances "the exception and not the rule" are troubling. Courts already have discretion to grant or deny extensions and often experienced counsel work together to keep the flow of the case on an efficient path. These changes are going to put the judges in a position where they feel they cannot grant routine extensions even in situations where counsel agree. It is unclear why we need to strip the Court of its discretion. Similarly, forcing trial dates and trial preparation when cases are often not reached, coupled with significant numbers of automatic deadlines, has proven to raise expense in the federal system and is expected to increase the cost of litigation in the state system if the proposed rule is adopted by the Court.

RULE 47. JURORS

Proposed Rule 47(f)(1) appears to unduly limit counsels' ability to share juror information with clients to assist in jury selection. As a matter of due process, parties should be entitled to have juror information shared with them.

RULE 55. DEFAULT

Several practitioners expressed concern about the proposed changes to Rule 55. Because the entry of default is often set aside by the Courts, with a lower standard, it appears to be counter-productive to force a party to proceed with a motion for entry of default judgment within a strict 28-day time limit as suggested by proposed Rule 55(a) and (b). The proposed changes to Rule 55 also appear to force hearings on non-liquidated damages or a party faces the prospect of a dismissal. In addition, it also appears to also prevent one party from being defaulted and left in a

case while the case proceeds against other parties unless a motion is filed, which is illogical, particularly in the context of foreclosure proceedings.

RULE 56. SUMMARY JUDGMENT

The limitations placed by the proposed amended Rule 56 on Statements of Undisputed Material Facts and Statements of Additional Undisputed Material Facts is wholly unworkable, particularly in complex cases. While we appreciate that motions for summary judgment with significant numbers of facts may require substantial work for the court, such submissions are a function of what Rule 56 requires for proof and the case law, which permits only one fact per statement. Adoption of these presumptive limitations will result in the parties and the judiciary being denied the use of a process that could otherwise narrow or eliminate the issues for trial and the courts routinely being unable to grant summary judgment. In the alternative, the Court may find that parties begin filing isolated motions for summary judgment on each legal issue within a case, which could ultimately increase the court's workload and the cost to the parties, and defeat the purpose of the proposed rule.

RULE 68. OFFER OF JUDGMENT

Although minimal changes to this rule have been proposed by the Committee, now might be the time for the Committee to consider amending Rule 68 in a way that allows for any party (including plaintiffs) to serve an offer of judgment in writing upon any other party to the action. We suggest that the Committee study and potentially adopt a rule similar to California's Rule 998. *See* Cal. Civ. P. Code § 998 (available at http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CCP&sectionNum=998 (last visited October 5, 2018)).

Dated: October 5, 2018

Lauri Boxer-Macomber
On Behalf of Kelly, Remmel & Zimmerman

JOHN D. SWEENEY
Firm Administrator
jsweeney@lokllc.com

October 5, 2018

Via E-Mail Only to lawcourt.clerk@courts.maine.gov

Matthew Pollack, Executive Clerk
Maine Supreme Judicial Court
205 Newbury Street Room 139
Portland, Maine 04112-0368
(207) 822-4146

RE: Comments on Proposed Maine Civil Justice Reform

Dear Mr. Pollack:

On behalf of Libby O'Brien Kingsley & Champion, LLC, please find our firm's comments on the proposed Maine Civil Justice Reform.

Please feel free to contact us if you have any questions or comments.

Sincerely,

/s/ John D. Sweeney

John D. Sweeney
Firm Administrator

c: LOKC Attorneys

Comments on Proposed Maine Civil Justice Reform

Libby O'Brien Kingsley & Champion (LOKC) thanks the Court for the opportunity to comment on the proposed Civil Justice Reform for Maine Courts. Although we applaud the Court's goal of improving access to justice through civil justice reforms, we do have some areas of concern, addressed below.

Track Assignments. We suggest that rules assign employment law cases to Track C. Employment law claims can be very complicated and usually involve multiple claims, and extensive discovery.

Presumptive Discovery Limits. We believe the rules should retain the existing limits of 5 depositions, 30 interrogatories, and no limit as to requests for production of documents or admissions. We are concerned that limiting the number of interrogatories or document requests will lead to (a) parties propounding compound or overbroad discovery requests to capture additional information, and (b) frequent requests to exceed the presumptive limits. If any additional limitations are imposed, we would suggest that the rules limit parties to two sets of requests for production of documents.

Initial Disclosures. We support the inclusion of an initial disclosure requirement in the Maine Rules of Civil Procedure. But we believe the timing of the initial disclosures should be altered. Frequently, a defendant will have no notice of a lawsuit until it is filed, and defendants sometimes do not retain counsel involved until shortly before the deadline to file an answer. We believe the defendant's deadline to file its initial disclosures should be 14 days after the plaintiff's initial disclosures. Alternatively, both parties could exchange initial disclosures simultaneously 30 days after the defendant's answer.

Summary Judgment Practice. Although LOKC agrees that summary judgment reform is needed, LOKC does not support the amendments in their current form. We believe there are other revisions that could better achieve the goal of streamlining the summary judgment process.

At the outset, LOKC's attorneys represent both defendants and plaintiffs. With respect to the statement of material facts, the primary problem is not generally the number of facts asserted, but that those facts sometimes offer argumentative, conclusory, or editorialized characterizations of the underlying record evidence. As a result, the other party frequently has to deny or qualify almost every fact. To address this, we suggest that the rule be amended to require that all statements of material fact should be direct quotations from the underlying record evidence, or a fair, non-argumentative description of the underlying evidence. This will lead to more admissions, and a cleaner record for the parties and the court.

Paired with the above, a presumptive limit of 50 and 75 statements of material facts in Track B and Track C cases, respectively would allow the parties to fully develop the record, yet prevent unnecessarily long or convoluted summary judgment records.

In terms of the summary judgment briefing schedule, we suggest that the Court adopt a format tracking the District of Maine's Local Rule 56, which creates a process requiring a party

to obtain authorization to file for summary judgment, and which stays all deadlines upon the filing of a notice of intent to file for summary judgment. The presiding judge may then tailor the deadlines and presumptive limits to fit the case and can hold a conference with the parties if appropriate.

Finally, we also believe that the Court should retain the existing page limits for the memorandum, together with the 14-day reply period. The 14-day reply period is of special importance, because 7 days is simply not enough time to draft a reply memorandum on a dispositive motion, and to admit, deny, or qualify all the non-moving party's statements of additional material fact. We believe the rules should retain the recently enacted 14-day reply period.

Maine Association of Mediators' Comments to Proposed M.R. Civ. P. 16B Alternative Dispute Resolution

The Maine Association of Mediators ("MAM") makes the following comments to the proposed amendment to M.R. Civ. P. 16B:

1) MAM mediators who regularly do rule 16B mediations generally find that the 120-day time limit to conduct mediations is often not long enough to allow the parties to have a complete enough exchange of information for the mediation to be productive. Even when paper discovery is conducted promptly, it often reveals the need for additional information to be obtained before depositions necessary to case evaluation can be conducted. Depositions following paper discovery can reveal additional documents and witness testimony that need to be obtained and parties that need to be involved in the litigation before the parties are ready for mediation. The consensus among MAM mediators who regularly do rule 16 B mediation is that the 180-day time allowed under the existing rule by agreement is more realistic and effective getting cases resolved. Mediations that have been scheduled to meet the 120 day time limit are more apt to need to be rescheduled or fail because the mediation is premature. Based upon that experience, it is expected that shortening the time period will result in numerous extension requests to the court and, where no extension has been obtained, a decrease in the mediation success rate. Therefore, MAM proposes that ADR not be held more quickly as would be required of the proposed amendment and that the time limit to conduct mediations be 180 days from the scheduling order.
2) MAM proposes that the Rule 16B(b) (4) exemption for personal injury cases not be changed to increase the $30,000 damages limit to $50,000. Many cases in that range of damages settle at mediation and a significant number of them may not settle if exempted. The proposed change could therefore significantly increase court backlog and the time that takes cases to get to trial, which would be inconsistent with the purpose of the Proposed Amendments to achieve speedy resolution.
3) MAM supports the proposed change to Rule 16B (f)(iv) to change the language from "appropriate" to "full" settlement authority and proposes that the same change be made to Rule 16B (f)(ii).

Submitted October 5, 2018

By: Rebekah Smith, Esq.
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October 5, 2018

Matthew Pollack, Executive Clerk
Maine Supreme Judicial Court
205 Newbury Street Room 139
Portland, Maine 04112

Dear Mr. Pollack:

As the Chair of the Litigation Section of the Maine State Bar Association, I am writing on behalf of the members of the Litigation Section. Having polled the Section members regarding the proposed amendments to the Civil Rules, elicited comments make clear that the membership has concerns about the proposal and wishes to have more time to consider them.

I have seen other submissions to the Court regarding the amendments, from individuals, organizations and firms. The varied comments of our membership are largely similar to those in other submissions. Our membership is concerned about the practical implications of several of the proposed amendments, including, but not limited to: the potential unfeasibility of mediations done a shorter timeline; potential inequities and impracticalities of the automatic initial disclosure rule; limitations on current discovery practices; limitations on summary judgment practices; loss of standard uses of Requests for Admissions; and potentially problematic public disclosures of settlement terms.

We have concerns that the proposed amendments, while in many respects sensible and well-intentioned, may present foreseeable unintended consequences. We are concerned that, in practice, some of these amendments would lead to many more discovery disputes and motions than we currently see, potentially over-burdening practitioners, parties and the courts. Our membership would also like to have a better sense about the research and resources that the drafters and the committee relied upon in drafting the amendments. Our membership is interested in knowing how similar amendments have played out in other states.

For these reasons, our membership requests an extension of time to allow for more consideration and analysis of the proposals before they are adopted. We thank you for the Court's efforts to improve on issues of judicial efficiency and access to justice, and we thank you for your consideration of our input.

Very truly yours,

James E. O'Connell
Chair, Litigation Section
Maine State Bar Association

Maine Trial Lawyers Association

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October 5, 2018

Matthew Pollack, Executive Clerk
Maine Supreme Judicial Court
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Portland, ME 04101-0368

Via email: lawcourt.clerk@courts.maine.gov

Dear Mr. Pollack:

On behalf of the Maine Trial Lawyers Association, please accept this letter as our Association's comments on the following proposed amendments to the Maine Rules of Civil Procedure.

The Maine Trial Lawyers Association is comprised of over 600 members. Our membership consists of attorneys representing both plaintiffs and defendants. We polled our membership and encouraged them to comment directly to you, and many have. The comments below generally represent the view of the MTLA and include input from both defense and plaintiff's lawyers.

During the process of reviewing these rules, several things became clear to us: the process needs more time for comment and there should be a more active role for various stakeholders. We respectfully request additional time to provide comments to the Court regarding these changes to better reflect the viewpoints of our members and practitioners.

We also request that the Court take the proposed rule changes and public comments and convene a group of stakeholders to work through the particulars and develop a final version of the proposed rules. During discussions amongst our board, there were many areas of the proposed rules that devolved into trying to divine the intent of the Court through examination of the proposed language and advisory notes. We strongly feel that if there was a direct line of communication between the Court and the stakeholders, many areas of concern would either vanish or be alleviated by a simple clarifying modification to the proposed rules. We believe that without this input, the rules, as proposed, will be ripe for unintended consequences and outcomes that will ultimately require additional amendment, not to mention additional judicial resources.

It is the hope of the Maine Trial Lawyers Association that the comment period and hearing established by the Court is the beginning of an extensive process that will create a dialogue and not the final stages of tweaking these proposals before implementation.

Proposed Rule 16

In general, the Maine Trial Lawyers Association does not object to the differentiated case management into three separate tracks. However, we have deep concerns with the limitations imposed on Track B regarding discovery. Currently, Rule 16 provides that discovery must be

completed within 8 months after the answer is filed. The proposed change to the Rule seeks to shorten discovery to be completed within just 6 months.

Every case is unique. While there are cases in which 6 months would be sufficient for discovery, those cases are the exception. This is true because even a straightforward auto crash case takes upwards of 8 months to: exchange paper discovery, conduct paper discovery follow-up, schedule and conduct fact witness depositions, schedule and conduct ADR, identify experts, and schedule and conduct expert depositions.

Even with the current 8-month rule for discovery, our members routinely request enlargements of time on all types of matters. With the proposed 6-month limitation, the Court will only be bogged down with an influx of these requests. Thus, we propose that the requirement to complete discovery remain at 8 months after the answer is filed.

During the process of reviewing proposed Rule 16 (a) (1) *Track A -Defined Process Track* and the associated proposed Civil Case Information Sheet, an issue arises regarding the intended scope of the requirement that Track A cases be "resolved in an expedited manner with **no discovery** [emphasis added] except upon order of the court for good cause shown." The Proposed Rule is not objected to by our membership regarding matters that involve 17A Settlement of Claim of a Minor, Title 14 Writ of Habeas Corpus (Prisoners), The Transfer of Structured Settlement Payment, 76D Appeal from District Court, Deposition for Use in Foreign Jurisdiction, Foreign Judgment Registration or Enforcement, and Rule 80D Forcible Entry Detainer Appeal of Law matters.

However, the proposed changes to Rule 16 provide that Track A includes such matters as: asset forfeiture, discovery (pre-action), arbitration action, 80B review of final government action, 80C review of final agency action, and 80M medical malpractice screening panel.

It is hard to imagine an asset forfeiture case without discovery regarding the assets of the party whose assets are at issue. Similarly, the very nature of a pre-action discovery matter and an arbitration action matter require discovery to determine the basic, underlying validity of the claim. It is also unlikely that litigants in 80B or 80C matters will proceed without contesting the "no discovery" aspect of Track A. Without further clarification of the proposed rule change, it appears that the Court is inviting a steady stream of motions for discovery, oppositions to such motions, replies to such motions, and hearings on such motions, burdening every Superior Court trial judge to which such matters are assigned.

The classification as Track A for Rule 80M Medical Malpractice Screening Panel matters appears to be in direct conflict with the language of Rule 80M and the statutory language of 24 MRSA §§ 2851, *et seq*. Currently, the Panel Chair "upon application of a party, may permit reasonable discovery." 24MRSA §2852 (6). Presumably, that is because it would be impossible for the Panel to make a determination whether there was "a deviation from the applicable standard of care by the health-care practitioner or health care provider charged with that care" and a finding "whether the acts or omissions complained of proximately caused the injury complained of" and a decision whether there was "any negligence on the part of the patient" that was "equal or greater than the negligence on the part of the practitioner or provider" without medical record discovery, discovery of the factual basis for the care provided by the alleged negligent party, discovery of the facts known to the patient, and discovery of the opinions of expert witnesses. If it is the Court's intent that placement in Track A with "no discovery" for Rule 80M cases radically alter the current force and effect of a finding by a Health Security Act panel, our members would find that a useful clarification.

If, on the other hand, elimination of the HSA finding's evidential impact at trial is the Court's intended effect, the transfer of the discovery process to the post-panel stage may be better understood. Diminishing or eliminating the evidential impact at trial of the HSA Panel's pre-litigation findings (as findings based on no discovery) necessarily alters the purpose of the screening panel process and would potentially also alter the likelihood of early resolution of medical malpractice claims.

Proposed Rule 16A

Proposed Rule 16A seeks to require the parties to provide the Court with a pretrial memorandum in all cases. Under the current rule, the parties often provide the requested information orally to the Court at the pretrial conference. In many cases, the requested information is included in other pleadings, such as in summary judgment or motion in limine memoranda. Requiring this information in a separate document would seem unnecessary. To be sure, there are some cases where a pretrial memorandum would be helpful. In those cases, the Court could order them to be filed. This case by case approach to pretrial memoranda would seem to be a preferred method of giving the Court what it needs while avoiding the filing of unnecessary or redundant pleadings.

Proposed Rule 16B

Under the current Rule, parties are having difficulty meeting the 120-day deadline imposed for ADR; joint written requests to the Court for extensions to 180 days are routine. The amendment shortens the deadline to 91 days and eliminates the ability of the parties to extend that time period by agreement. The Proposed Rule is unrealistic and not likely to increase the likelihood of success at mediation. Rather, the Proposed Rule is likely to increase Court involvement as requests for additional time by motion are likely to become routine. The consensus among the Association and local mediators is that more time rather than less is the desired solution.

Additionally, exempting insured corporate and government agency defendants from required attendance will not advance the likelihood of settlement. Having representatives with knowledge of the subject matter of the dispute in attendance will increase the ability of the parties and the mediator to assess the benefits and risks of settling versus proceeding to trial.

The MTLA objects to the requirement that "all the terms of the settlement" be reported to the Court and incorporated in a Court order. This broad requirement would be at odds with the normal preference of not discussing settlement terms with anyone, other than on a need to know basis. Indeed, many settlement agreements require confidentiality. Moreover, requiring all terms of settlement to be reported to the Court essentially turns the settlement terms into a public record. With electronic filing continuing to play a bigger role in our Courts, we are concerned with the accessibility of settlement terms to the general public.

Proposed Rule 26A

Upon initial review, Proposed Rule 26A seems generally favorable to plaintiffs, as most of the information, calculations, and other documents required would typically already have been obtained for the purposes of settling the case. Thus, when a case is ready to be filed, the plaintiff would likely have no problem meeting the rather quick deadline for filing the initial disclosures. However, from the point of view of our members who are defense counsel, the deadline could put them into a full-fledged scramble as they must rely on the insurer to get them a complete file and to line up the documents and information required. This rule coincides with the proposed new timetable for ADR. Rushing parties through initial disclosures and then ADR will likely prevent a more thorough investigation into each case that is required in order to promote settlement.

The Proposed Rule sets forth a one size fits all approach that is ill-advised. For example, the Proposed Rule would require plaintiffs to produce 10 years of prior medical records. In some cases that requirement may make sense, but in many others, it does not. The decision on how far back to go in a plaintiff's medical records should be made on a case by case basis by the attorneys handling the case. If they cannot agree, then they may seek court intervention. By requiring counsel to supply 10 years of prior medical information in every case, the Court will see a significant surge in motions to protect certain medical information. As drafted, it is unclear if dental, mental health providers, OBGYN records, licensed massage therapists, acupuncturists, and other healing arts records must be included and many cases do not require the disclosure of everything especially if a person is not making a certain type of claim.

Finally, the Proposed Rule seems one sided. If the plaintiff is being asked to disclose previous claims, accidents, and so forth, should not the defendants be required to disclose the same? The MTLA is concerned that the principle of reciprocity is not being required.

In sum, the proposed automatic disclosures would likely generate more unnecessary work for the parties, their counsel, and the Court. The current practice, while not perfect, is preferable.

Proposed Rules 30, 33, 34

The MTLA generally opposes any limitation to the current rules of discovery without further information. It is unclear to us exactly which cases get put into Track B and C, how those cases might be removed, and under what guidelines they are removed from one track to the other. The MTLA could support some limits to discovery depending on how the system of tracks would actually work. For example: in a simple automobile car collision with clear liability and a fixed injury, limited discovery would benefit both sides. However, a premises liability case with a more complicated injury would not benefit. Both of these types of cases might land in Track B. This is an excellent example of the need for more active interaction between the Court and various stakeholders.

Currently, Rules 30, 33, and 34 provide that parties have a limit of 5 depositions, a limit of 30 interrogatories, and no limit on requests for production. The proposed limitations in Track B cases of 4 depositions, 10 interrogatories, and 15 requests for production are arbitrary and unnecessary. Rarely are there situations where the current limitations are abused; many cases are handled well within the limits. However, there are times when particularly complex issues arise that call for the use of all available depositions or interrogatories and more extensive requests for production. These discovery tools serve an important purpose in that they allow our members to simplify the case for trial. If any abuses of the rules do arise, they would be better dealt with on an individual basis. In sum, we would suggest no changes to these rules. If the suggested limits are imposed, the result will likely be a significant increase in the number of motions to allow more depositions, interrogatories, and requests for production.

Proposed Rule 36

The Association opposes Proposed Rule 36 to eliminate requests for admission other than for genuineness of relevant documents without first obtaining Court authorization. Requests for admission are an effective tool to narrow issues at trial and to facilitate proof with respect to remaining trial issues. Requests for admission are useful to establish a multitude of matters, including, but not limited to: criminal history; wage loss; medical bills; repair costs; life expectancy; permanent impairment; weather conditions; municipal, state, and federal regulations and codes; and admissibility of records.

Requests for admission streamline the trial process and save many hours of trial preparation. Limitation on the use of these requests runs counter to the guiding principle of Rule 1 of securing "the just, speedy and inexpensive determination of every action." Requiring Court authorization to serve requests for admission only increases the burden on the Courts.

Proposed Rule 38

The changes to Proposed Rule 38 specify the timeframe that both plaintiffs and defendants must adhere to in order to request a jury trial. Currently, for all cases filed on and after January 1, 2002, the parties look to the scheduling order entered by the Court as to the deadline for filing such a jury trial request. That deadline is usually after the completion of ADR.

Now, under Proposed Rule 38, it is made clear that plaintiffs must file a demand for a jury and pay the $200 fee within 28 days after the filing of the answer. If the plaintiff has not done so and the defendant wishes to have a jury trial, then the defendant must pay within 35 days after the filing of the answer. If the case was filed in District Court and the defendant wished to remove to Superior Court for a jury trial, it is made clear under the proposed amendment that the demand and payment for jury trial must be made no later than 35 days after the due date of the answer and again,

the cost is $200. Essentially, the Proposed Rule seeks to require jury trial demands and payments earlier in the trial process.

The Maine Trial Lawyers Association does not object to the proposed amendment concerning the shortened time limits to demand a jury trial. However, we are concerned with the requirement of a jury fee this early in the trial process. Few cases actually make it to trial. Instead, the majority of cases make an earnest effort to reach settlement by the end of the ADR process. Requiring parties to provide a jury fee before ADR has taken place is misguided and puts an unnecessary cost onto many parties who will never see trial. The current rule provides a more reasonable approach to providing the jury fee when the likelihood of going to trial is much more substantial.

Proposed Rule 56

The Maine Trial Lawyers Association opposes the Proposed Rule 56 as currently drafted. We take the position that a case's assigned track is not an adequate basis upon which to impose shorter deadlines or greater limitations on the content of a motion for summary judgment.

We generally oppose allowing motions for summary judgment to be filed before the close of discovery because discovery tends to create and narrow genuine issues of material fact. To modify the proposal and current rule provisions, we suggest not allowing such a dispositive motion to be filed before the close of discovery unless the movant requests the Court make a finding of an exceptional circumstance and the Court makes such an order. Furthermore, the proposed 14-day post-discovery deadline should be increased to 28 or more days or the Court should revert to the current rule.

Too many motions are filed not on the merits, but to gain a tactical advantage at ADR while the motions are pending. Some litigants will not make serious attempts at settlement until they file motions for summary judgment and/or obtain orders on those motions. Under our proposal, early ADR will at the very least be attempted rather than delayed, which currently happens in a substantial minority of cases.

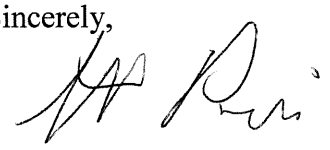
The proposed deadline of 14 days following the close of discovery in Track B cases will be insufficient, in many cases, to permit the thorough research and review of the evidentiary record required to determine whether a motion for summary judgment is appropriate and, if so, to adequately draft such motion and to assemble the necessary supporting evidence. The Proposed Rule, while limiting the time in which a moving party may file a motion for summary judgment, places no similar restriction on the opposing party, who is permitted 21 days to file an opposition regardless of track. The moving party is further disadvantaged by the deadline of 7 days in which to reply to any opposition. The deadline for replying to an opposition in the context of any other motion is 14 days. M.R. Civ. P. 7(e). There is no reason to provide a shorter time for reply in the context of a motion for summary judgment. In this context, a longer deadline would be proper as a reply is likely to be accompanied by an additional statement of material facts and supporting affidavits.

The shorter deadline for Track B cases may encourage the earlier filing of motions for summary judgment, but at a cost. Proposed Rule 56 permits parties to request continuances when such motions are filed before adequate discovery has been completed. The Court may even permit the taking of additional depositions. If motions for summary judgment are filed too early, the Court is likely to see an increase in the number of requests for extensions and/or further discovery. Such requests require judicial resources and attention and are likely to result in unnecessary delay.

Similarly, a case's track may not be a reliable indicator for the appropriate limit on the number of facts that a party may identify in its statement of material facts. Track B includes most tort claims, including products liability cases, automobile cases, general negligence cases, and premises liability cases. Disputes regarding the applicability of insurance coverage to such losses appear to be classified as Track B as well. Even in cases with less-than-catastrophic damages, complex legal and evidentiary issues frequently arise. The limit of 25 facts is too restrictive. A presumptive limit of 50 facts proposed for Track C cases may be more appropriate. Limits based on the number of claims, theories of liability, or parties are another alternative that may more accurately reflect the needs of an individual case.

Thank you for your attention to this matter. Please feel free to contact us if you have any questions regarding these comments.

Sincerely,



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October 5, 2018

The following comments are being submitted on behalf of Pine Tree Legal Assistance in response to the proposed adoption of Differentiated Case Management principles to all civil cases by the Maine Supreme Judicial Court.

INTRODUCTION

Pine Tree Legal Assistance is a statewide nonprofit providing free legal assistance to low-income individuals in the civil justice system in Maine. It has been in operation since 1967 and currently maintains offices in six locations (Portland, Lewiston, Augusta, Bangor, Machias and Presque Isle.) It currently employs 39 lawyers, most of whom regularly appear in Maine District Courts throughout the state, and, less frequently, before the Superior Court, Supreme Judicial Court and Maine probate courts.

The Maine Supreme Judicial Court has invited comments on proposed amendments to the Maine Rules of Civil Procedure. The proposed amendments would make significant changes to the way cases are generally processed through the court system and make additional changes to specific procedures.

Pine Tree Legal Assistance generally supports the proposed amendments to the Rules of Civil Procedure and improving efficiency in the court system. However, we are aware that a significant percentage of litigants are not represented by attorneys. Meaningful access to and understanding of our courts is critical, especially for pro se litigants. We encourage the use of plain language in the rules and any new notices and forms that are created as the result of any new rules. The average American adult reads at about a 7th to 8th grade level and notices and instructions should be written with this in mind.

Pine Tree Legal Assistance would like to comment specifically on the proposed amendments to Rule 16, Rule 26A, and Rule 55. Additionally, we would like to comment on how the changes in the rules would affect consumers in debt collection cases in the proposed addition of Rule 80N.

RULE 16

We support the idea that cases would be separated onto different tracks based on the legal issue and complexity of the particular case. In reading the rule, it does not make reference to family law cases. It would clarify the status of family law cases if Rule 16 explicitly stated that family matters are track A or neither Track A, Track B, nor Track C.

RULE 26A

The requirements of the proposed Rule 26A would be challenging for a number of practical reasons. Regarding the time limits, while actions are often filed after careful planning and investigation, emergency litigation is sometimes necessary (e.g., to request a temporary restraining order.) If litigants have the bad luck of needing to file right before a holiday weekend, there would be very limited time to prepare the information, especially in Track B cases. Further, seven day time limits can be very difficult given the realities of practicing law (e.g., if a client is delayed in responding to requests, if an attorney is set for trial in another matter, or if new information continues to arise.) For these reasons, we would ask that the deadlines in Track B be extended to 28 days for the plaintiff and an additional 14 days for the defendant, and 35 days for the plaintiff in Track C and an additional 21 days for the defendant.

Additionally, the requirements of Rule 26A would be very challenging for pro se litigants. While pro se litigants are presumed to have knowledge of the rules, from a practical perspective, it would be difficult to know the automatic disclosure rules exist. If the Court were to create an "automatic disclosure" form, it would guide pro se litigants on how to comply with the rules and help the new process work more efficiently. Two copies of the form could be provided with every civil summons, one for the plaintiff and one to be served on the defendant with the summons and complaint. In addition, we encourage the court to publish a pro se guide to civil court requirements and process that explains in plain English the required steps for bringing a case and defending a case and identifies the required forms and where to get them. Pine Tree is prepared to assist in any effort to publish such a guide.

RULE 55

Pine Tree Legal supports the changes to the rules regarding defaults and default judgments. However, we think it is important that the default process for protection from abuse matters remains the same. Plaintiffs seeking protection from abuse orders must be able to leave court with a judgment. The rule does not reference any exceptions to the process it lays out and it would be helpful to clearly state how the rule affects the process in summary proceedings.

RULE 80 N (DEBT COLLECTION CASES)

Pine Tree Legal Assistance supports M.R.Civ.P. 80N. Pine Tree's support is informed by our extensive experience in assisting low income Maine residents defend against third party debt collectors and purchasers. The practices of third party debt collectors and purchasers is well documented and relies heavily on the premise that uninformed defendants without counsel will default and only minimal or no effort to verify the debt is required before brining suit. See *infra* at p. 5.

Pine Tree Legal Assistance represents consumers against third-party debt collectors in District Court and Small Claims Court. In 2017, Pine Tree Legal Assistance provided

legal services to Maine families and individuals in 7,735 cases, of which 973 involved representation of clients in consumer cases.

Pine Tree Legal Assistance has a project in ten courts that provides representation to consumers in small claims court. These courts include small claims court located in Springvale, Biddeford, Portland, Lewiston, South Portland, Farmington, Augusta, Machais, Calais, and Ellsworth. We appear in Court on the day that Small Claims cases are heard, announce our presence, and represent those consumers who seek our assistance. We typically do not meet these clients until the day of court and are often successful in defending these cases due to the lack of reliability of the evidence presented by the plaintiffs who include Midland Funding, Portfolio Recovery, LVNV and others.

Small Claims Court was originally designed to provide a venue whereby litigants with claims under $800 could appear *without attorneys* and present their claims to the court. Since the Small Claims Court has been established, the law has been changed so that Small Claims Court now have the jurisdiction to hear claims of up to $6,000. In addition, since the establishment of a Small Claims Court in 1979, the Small Claims docket is typically dominated, not by litigants who appear without an attorney, but by out of state corporations (third party debt collectors) who appear *solely by counsel*, and who bring cases against consumers who are largely unrepresented.

Pine Tree Legal Assistance also represents consumers who contact us to represent them in regular District Court cases.

The original creditors have typically written off the debt resulting in a substantial tax benefit for them. These debts are then sold to third party debt collectors, often for pennies on the dollar. The third party debt collectors then attempt to collect the debts.

In District Court, we typically serve discovery on the third-party debt collector requesting a copy of the documents that resulted in the third-party debt collector acquiring the debt. These documents usually involve the transfer of hundreds of accounts and contain language whereby the seller expressly states that they do not warrant the validity of any of the debts being sold, and expressly warrant that some of the debt being purchased may have been discharged in bankruptcy. In some responses to our requests for discovery, we have seen sales documents that specifically state the seller will not be providing any additional documentation to the debt buyer that is not contained in the original sale documents. In other cases, the contracts contain provisions that expressly state there is no warranty as to the validity of the debt.

We also see similar cases that involve the collection of private student loans, both in Small Claims Court and in District Court. In these cases, the plaintiffs suing on the balance of the student loan are not the original lenders and are often unable to provide evidence as to the transfers. The transfer documents in these cases also contain language whereby the seller states that there is no warranty of title or enforceability.

Even if we are successful in an affirmative case, and no matter how many Small Claims Court cases we win, in the vast majority of cases, the plaintiff obtains judgment by default. This occurs even if the plaintiff does not possess the evidence necessary to prove its cases in a contested hearing. In our view, the problem with the current process is not that it is too burdensome on the debt collector. The problem is that it has become too easy for debt collectors to obtain judgments to collect debts in which the debt collector is not able to prove either the amount due or ownership of the debt.

WHAT M.R.Civ.P. 80N WOULD DO

1. Require plaintiffs in consumer debt collection cases to prove they own the debt they are trying to collect.
2. Provide to the Court and consumers the information necessary to demonstrate the existence of the debt.
3. Provide a form answer to defendants to assist consumers in responding to complaints filed in consumer debt collection cases.
4. Provide for Court review of filings in consumer cases to determine the adequacy of the Court filing.
5. Provide a specific process for Court review before the entry of a default judgment in consumer debt collection cases.

WHY WE SUPPORT M.R.Civ.P. 80N

As set forth at 4 M.R.S. §8, the Maine Supreme Judicial Court has the power to prescribe, by general rules, for the Probate, District and Superior Courts of Maine, the forms of process, writs, pleadings and motions and the practice and procedure in civil actions at law. The requirements set forth in this proposed rule are necessary to protect consumers and ensure that the judgments issued by courts are upon reliable evidence and that unsophisticated consumers do not unknowingly waive their rights. The provisions of this rule are an appropriate exercise of the court's rule-making power as they provide these protections to consumers while not abridging, enlarging nor modifying the substantive rights of any litigant.

The information that debt collectors must provide consumers to document the debt is at the heart of the issue. The third-party debt collector's business practice appears to be largely based upon obtaining default judgments against consumers or convincing consumers to agree to pay debts that the debt collector knows it cannot document.

The documents that a plaintiff would be required to produce pursuant to Rule 80N are necessary so that the defendant can determine the validity of the debt. Many defendants who request our assistance are unsophisticated. Many fear going to jail if they are unable to pay their alleged debts, even though their income is exempt from attachment (such as disability benefits) and they have no assets. The plaintiff needs to provide to the defendant evidence of the debt that would be admissible under the typical Rules of Evidence demonstrating the amount of the debt and the debt collector's ownership of the debt. Anything short of this unfairly influences the defendant into thinking that they are legally liable to pay a debt that the plaintiff has no ability to prove.

The importance of these requirements is critical, given the lack of reliability of the information provided by many third-party debt collectors. The Consumer Financial Protection Bureau (CFPB) entered into consent orders with Encore (Midland Funding) and Portfolio Recovery Associates because Encore and Portfolio Recovery Associates threatened and deceived consumers to collect on debts they should have known were inaccurate or had other problems. The CFPB found that Encore Capital Group and Portfolio Recovery Associates bought debs that were potentially inaccurate, lacking documentation, or unenforceable. Without verifying the debt, the companies collected payments by pressuring consumers with false statements and churning out lawsuits using robo-signed court documents. As a result of these consent orders, both Encore and Portfolio were ordered to overhaul their debt collection and litigation practices and to stop reselling debts to third parties. Encore was required to pay up to $42 million in consumer refunds and a $10 million penalty and stop collection on over $125 million worth of debts. Portfolio was ordered to pay $19 million in consumer refunds and an $8 million penalty, and stop collecting on over $3 million worth of debts. http://files.consumerfinance.gov/f/201509_cfpb_consent-order-encore-capital-group.pdf; http://files.consumerfinance.gov/f/201509_cfpb_consent-order-portfolio-recovery-associates-llc.pdf.

In 2017, the CFPB also took action against National Collegiate Student Loan Trusts and Transworld Systems for Illegal Student Loan Debt Collection Activities that required that 800,000 loans be independently audited, and required companies to pay at least $21.6 million and stop suing for invalid or unverified debts. https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-national-collegiate-student-loan-trusts-transworld-systems-illegal-student-loan-debt-collection-lawsuits/

In January 2016, Human Rights Watch published a study of the debt buying industry in the United States that found that the debt buying process "places a huge, unfair burden on alleged debtors and is often the reason poor families struggle to pay these debts over time. This can come at the expense of alleged debtors' ability to secure basic economic and social needs such as food, clothing, and medicine." *Rubber Stamp Justice,* p. 7. https://www.hrw.org/report/2016/01/20/rubber-stamp-justice/us-courts-debt-buying-corporations-and-poor.

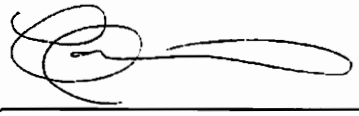
The requirements set forth in the proposed Rule 80N are also important given that the Maine Supreme Judicial Court has repeatedly held that the Maine Rules of Evidence apply in all judicial actions, including actions in which parties appear *pro se* without representation of counsel.

The debt collector's choice to develop a business model that routinely does not include the purchase of billing statements cannot be allowed to impact the requirement that these entities comply with the Maine Rules of Evidence when they institute legal action against a Maine consumer. At the very least, third party debt collectors should be held to the same standard as pro se litigants.

In a significant majority of the debt collection cases defended by Pine Tree Legal Assistance, the matters are dismissed because of (1) the debt buyer's refusal to comply with discovery orders that they produce purchase and sale documents regarding transfers of the debt, (2) the debt buyer's failure to produce a witness at trial able to authenticate business records, or (3) the debt buyer's decision to dismiss the case on the eve of trial because the debt buyer decides not to produce a witness to appear at trial.

We believe that the proposed Rule protects the integrity and the legitimacy of the Court process and prevents court-sanctioned abuses by debt buyers. The proposed Rule helps to further this goal by (1) requiring that Plaintiff debt-buyers file cases only after they demonstrate the ability to produce relevant documents; (2) streamlining the process by which defendants can respond by providing a court-sanctioned answer form; and (3) by requiring Court review before a default judgement may be entered to ensure that the Plaintiff debt buyer has met its burden of proof in compliance with the Maine Rules of Evidence.

Respectfully submitted on October 5, 2018,



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October 5, 2018

VIA HAND DELIVERY

Matthew Pollack
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RE: Proposed Civil Rule Amendments

Dear Mr. Pollack:

We greatly appreciate the Maine Judicial Branch's efforts to improve Maine civil procedure and welcome all discussion aimed at improving judicial efficiency and access to justice. However, we have concerns about the need for the Differentiated Case Management (DCM) system, the resources necessary to effectuate this system, and the loss of flexibility and collaboration that has been a hallmark of practicing law in the Maine.

Civil litigants in Maine already have access to the Maine Business and Consumer Court and the Small Claims Court. These courts provide civil litigants with simple, speedy, and inexpensive resolution of cases, and are more than capable of handling the simple claims that the proposed track system is designed to address.

Relevant studies and public comment seem to indicate that the Maine judiciary does not have the resources required to support a DCM system. *See* NATIONAL CENTER FOR STATE COURTS, SURVEY OF JUDICIAL SALARIES (2018) (demonstrating that adjusted for cost-of-living, Maine's judges of general jurisdiction trial courts are the lowest paid in the country); Leigh I. Saufley, *Funding Justice: The Budget of the Maine Judicial Branch-We Did Get There From Here*, 62 ME. L. REV. 671, 672 (2010) ("During the last two decades, the lack of sufficient dollars appropriated to Maine Judicial Branch and the impact that this underfunding has had on people seeking access to justice have created consistent concerns for leaders in the Judicial Branch as well as for those in the Executive and Legislative Branches.").

The intensive case management characteristic of a DCM program and its focus on early disposition will require significant staff, management, and information system resources to be effective. CAROLINE COOPER ET AL., BUREAU OF JUSTICE ASSISTANCE, DIFFERENTIATED CASE MANAGEMENT IMPLEMENTATION MANUAL 14 (1993). The proposed track system would require continuous court monitoring of case progress within each track to ensure that cases adhere to track deadlines and requirements. The track system would also require judges to screen each case shortly after filing so that cases are assigned to proper tracks. It appears that the State judiciary system, as currently funded and staffed, lacks the resources to implement the court intervention required to successfully effectuate a DCM system.

The standard proposed track criteria would not adequately categorize cases according to the time and tasks required for their fair disposition, nor would the criteria permit flexibility to accommodate the range of management and processing needs of individual cases. It is often difficult to discern a case's scope of discovery, complexity, and expected timeline at its onset, when the track would be determined. Management aspects of a case often change during the pretrial process. And differentiating by case type is not by itself an accurate way to estimate the time required to resolve all such cases fairly and expeditiously.

Of particular concern is Proposed M.R. Civ. P. 16(d)(4), which provides that "[o]nce established, a scheduling order may be modified only upon a demonstration of good cause for not being able to adhere to the prior schedule established by the court . . . ." The proposed Rule would not allow counsel to modify scheduling orders without a showing of good cause. This proposed rule stands in contrast to the current rules and general practice that encourage attorneys to collaborate to create an effective scheduling order with the assistance and oversight of the court. M.R. Civ. P. 16(a)(1-2). Additionally, the Business and Consumer Docket (BCD) Procedural Rules provide that a "scheduling order may thereafter be modified or revised, as the court in its discretion, deems necessary or appropriate, to meet the purpose and goals of the BCD." M.R. Civ. P. 132. The BCD Rule has enabled Maine attorneys to effectively represent their clients and customize the scheduling order for each case. Assigning cases to set tracks, without allowing for schedule modifications, but for a showing of good cause, would likely discourage attorneys from collaborating on how cases are adjudicated and may even limit the number of clients solo and small firm practitioners could effectively represent.

Also of particular concern is Proposed M.R. Civ. P. 40, which provides that continuances will only be available in "exceptional circumstances," even if the motion for a continuance order is unopposed. While we appreciate the need to be skeptical of opposed motions, the current system of encouraging and respecting collaboration among counsel seems like the more prudent approach.

Again, we greatly appreciate the Maine Judicial Branch's efforts to provide effective judicial management of civil cases in Maine's state courts. However, from our perspective some of the proposed amendments present a solution in search of a problem that does not appear to have been identified by the Maine bar or the public.

We are always open to considering ways to improve civil process in Maine. We would welcome the opportunity to further discuss the proposed amendments with the Maine Judicial Branch and our fellow bar members.

Sincerely,

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Timothy J. Bryant, Co-Chair

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October 5, 2018

VIA E-MAIL
Matthew Pollack, Esquire
Clerk of the Law Court
P.O. Box 368
Portland, ME 04112

Re: Draft Proposed Amendments to the Maine Rules of Civil Procedure (Proposed Implementation of Civil Justice Reform through Differentiated Case Management)

Dear Mr. Pollack:

I have represented creditors, as well as others, in the courts of the State of Maine since I became licensed to practice as an attorney in Maine 1981 and am a member of the Foreclosure Division Commission (the "Commission") established earlier this year by the Supreme Judicial Court. In my capacity as a creditors' attorney, as well as a co-author of 14 M.R.S.A. § 7071, I have several comments on the above-captioned draft Amendments as follows:

A. Personal Property Recovery Actions

1. Proposed Rule 5(h)(2) refers to "personal property recovery actions". Presumably, this is intended to be a reference to an action to recover possession of personal property pursuant to 14 M.R.S.A. § 7071, which can be a summary proceeding, as opposed to a reference to a replevin case, which is also an action to recover personal property. To clarify, this phrase in Proposed Rule 5 (h)(2) should be changed to read "personal property recovery actions pursuant to 14 M.R.S.A. § 7071". A similar change should be made to the listing of Track A Superior Court actions in the Civil Case Information Sheet, with the word "Appeal" ("Appeal" should be added to the listing of "Forcible Entry and Detainer Action – Eviction" on that sheet as well).

2. Proposed Rule 16(a)(1) lists certain specific actions where are presumed to be Track A cases. These include forcible entry and retainer ("FED") actions, which are not otherwise mentioned in the District Court actions listed on the Civil Case Information Sheet. Actions under § 7071 ("§ 7071 Actions") may be brought as either summary or plenary actions. Section 7071 Actions, if brought as a summary proceedings, were intended to have many of the same procedural features of FED cases, whereas it was intended that plenary § 7071 proceedings would be subject to the normal Rules of Civil Procedure and would not be handled on an expedited basis. Compare § 7071(2) with § 7071(9). Section 7071 Actions are also not included in the listing of District Court actions on the Information Sheet. As a result, it would make a great deal of sense to add "summary personal property recovery actions pursuant to 14 M.R.S.A. § 7071" to the explicit list of actions in this Proposed Rule.

3. I file many § 7071 Actions on behalf of clients who seek to repossess collateral, primarily motor vehicles. In several instances, court clerks have asked whether these were being brought as summary or plenary actions. Additionally, plenary actions should be treated for tracking purposes as ordinary civil actions, and should probably be listed as presumptive Track B actions on the Civil Case Information Sheet. This will allow court clerks to easily determine if the action is being brought on a plenary basis and will also indicate to the parties into what track the case will ordinarily be placed.

4. Proposed Rule 16(b)(1)(C), dealing with case assignments, references FED appeals, but does not list appeals of § 7071 Actions. Since the procedure for appeals of summary § 7071 District Court decisions was intended, to the extent applicable, to mirror that for FED appeals, "Appeals in summary personal property recovery actions pursuant to 14 M.R.S.A. § 7071" should be added to that subsection.

5. Proposed Rule 16B(a)(1) exempts FED actions from the ADR requirements of that Rule. Summary § 7071 Actions are intended to be handled as summary proceedings and should be exempt from the ADR requirements, particularly since, as in FED actions, trial will ordinarily have been held and the proceeding completed by the time that the ADR deadlines are reached in a summary § 7071 Action. Accordingly, Proposed Rule 16B(1) should be modified to add "summary personal property recovery actions pursuant to 14 M.R.S.A. § 7071".

B. Proposed Rule 15

Proposed Rule 15 provides that a party may amend a pleading without court permission only if this can be done more than 63 days before a scheduled trial in cases where no responsive pleading is required. This effectively would cut off any ability to amend a complaint in § 7071 Actions which are summary in nature, as well as in FED actions, since the initial hearing in those cases is the trial, which is can be held as soon as 7 days after the summons and complaint is

served and in almost no instance is held 63 days after such service. It would be preferable to provide that in such actions the compliant could be amended without the necessity of court approval if the amended complaint is served upon the defendants at least 7 days prior to the return date set forth in the summons. This would give the defendants the same minimum amount of time to react to the amended complaint as they would have had with respect to the original complaint.

C. Collection Actions

1. Proposed Rule 16(a)(1) provides that "collection actions" will presumptively be handled as Track A cases without defining that term. Proposed Rule 80N initially states that a subset of "collection actions", that is, those which seek to collect credit card and student loans, as well as all collection actions brought by debt collectors, are subject to that Rule. See Proposed Rule 80N(a). Although entitled "Commencement of a Credit Card, Student Loan, or Debt Buyer Collection Action", Proposed Rule 80N(b) goes on to state that a "collection action" (without modifier) is commenced pursuant to that Rule. Although it is clear overall that Proposed Rule 80N is intended to only apply to the referenced subset of collection actions, this inconsistency in terminology, pus the lack of a definition of the unmodified term "collection action" makes the scope of Proposed Rule 16(a)(1)'s reference to "collection action". Presumably, the reference is intended to be only to those collection actions subject to Proposed Rule 80N, and, if this is the case, the phrase "collection actions" in Proposed Rule 16(a)(1) should be changed to "collection actions subject to Rule 80N". If the scope of the term "collection actions" now used in Proposed Rule 16(a)(1) is intended to be broader than Rule 80N matters, then the term will need to be defined.

I appreciate all of the work that has been undertaken to prepare these Proposed Rules and hope that my comments have been helpful.

Sincerely,

F. Bruce Sleeper

Comment on Proposed Rule Change to Rule 80B

1 message

Amy K. Tchao <ATchao@dwmlaw.com> Fri, Oct 5, 2018 at 3:56 PM
To: "lawcourt.clerk@courts.maine.gov" <lawcourt.clerk@courts.maine.gov>

Dear Honorable Members of the Law Court:

We are writing to register our concerns about the proposed civil rule change requiring governmental bodies to prepare the Rule 80B record whenever a party initiates a Rule 80B action. Our firm represents more than 100 municipalities, school units and other governmental entities across the State. In our view, a rule change like this would improperly shift the cost burden of producing the record onto the governmental entity, the party being sued, rather than the party initiating the legal action. At the very least, the rule should require that the plaintiff bear the cost of preparing the record.

In our experience, we do not often see delays in the filing of the record, and when we do, it is usually accompanied by a failure by the plaintiff to vigorously pursue the litigation. A governmental entity should not be required to bear the burden of preparing and filing a record for an appeal that may not be actively pursued by the plaintiff.

We urge the Law Court to decline to make this proposed change to Rule 80B.

Thank you for your consideration.

Sincerely,

Amy K. Tchao

David M. Kallin

Agnieszka A. Dixon

Richard A. Spencer

James T. Kilbreth

Melissa A. Hewey

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ATTORNEYS AT LAW

State of Maine
Email and Calendar
Judicial Branch

Matt Pollack <matt.pollack@courts.maine.gov>

Comment on proposed rule changes ("Civil Justice Reform")

'Marshall Tinkle' via Law Court Clerk <lawcourt.clerk@courts.maine.gov> Mon, Sep 24, 2018 at 2:31 PM
Reply-To: Marshall Tinkle <mtinkle@thomport.com>
To: Clerk of the Law Court <lawcourt.clerk@courts.maine.gov>

Good afternoon,

I respectfully offer the following brief comments on the proposed rule changes. These comments are not offered on behalf of any organization.

First, I'm disturbed by the proposed virtual elimination of requests for admission. Such requests generally are far easier to respond to than interrogatories or production requests. They have long proved to be a very useful discovery device when used judiciously.

Second, I don't understand the policy objective of prohibiting such requests in debt buyer collection actions. Why is one small class of plaintiffs being singled out in this fashion?

Third, Rule 40 as redrafted seems to create a presumption against continuances. Heretofore, requests for continuances have been left to the sound discretion of the trial court. That has worked well.

Fourth, the new proposed Rule 80N, which together with Rule 1 of the small claims rules appears to carve an exception to the availability of small claims procedures, seems to be at odds with the stated purpose of the Civil Justice Reform amendments to reduce disproportionate costs and delay – at least where credit card and student loan creditors are concerned. There's no reason to treat such claims that are less than $6000 differently from other small claims (except to the extent the Legislature has specifically added certain pleading requirements). The Legislature has provided a cost-effective process to pursue small claims across the board. I would respectfully submit that if a particular class of creditors is now to be deprived of that remedy, the change should be implemented by statute rather than by court rule.

Thank you,

Marshall

Marshall J. Tinkle, Esq.

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October 5, 2018

Via Email

Matthew Pollack
Executive Clerk
Maine Supreme Judicial Court
205 Newbury Street, Room 139
Portland, ME 04112-0368

Re: Proposed Civil Rule Amendments

Dear Mr. Pollack:

I am Chair of the Trial Department of Verrill Dana LLP and write on behalf of the members of my department to share our collective views on the proposed Civil Rules amendments under consideration by the Maine Judicial Branch. The amendments, if adopted, will significantly impact whether cases are filed in the civil courts and how filed cases progress from initial pleadings through trial. We appreciate the opportunity to provide comments on the proposed amendments that will directly impact our clients and the way we represent them.

We largely agree that the problems the amendments are attempting to address are real, and also agree with the amendments' stated goals — to improve access to justice by making civil process proportional to individual cases. We believe that, for many cases, the amended rules will lead to resolutions that are more just, speedier and less expensive. However, some of the proposed amendments would impose unrealistic timelines and limitations, especially for more complex cases, that could actually drive up the litigation costs incurred early in a case's trajectory, making justice less available to some individuals and businesses. We identify below the proposed changes that we believe could have these unintended consequences.

In addition, many of the amendments will necessitate active case management by the judiciary, which will place additional burdens on an already stressed court system. Inability to satisfy those additional burdens could undermine the very purpose of the amendments. For example, while the proposed deadlines and presumptive limits may be appropriate in many cases, there will be other cases in which such deadlines and limitations are clearly inappropriate. In those cases, the courts will be asked – perhaps on numerous occasions – to respond to requests

of the parties to modify deadlines and limits, and to do so on short notice. The Courts' abilities to promptly respond to such requests will directly impact the thoroughness and fairness of civil proceedings.

With the goals of the amendments in mind, we offer the following, specific comments:

1. Modification of Scheduling Orders. This proposed amendment appears to restrict the discretion of the Trial Courts to grant enlargements of time. We believe that the Trial Courts are in the best position to determine the propriety of the requested enlargement and do not think that a change in the rule is necessary.

2. Automatic Disclosures. We believe that automatic disclosures, in general, will increase the speed and efficiency of litigation. The automatic disclosure requirement will force lawyers and clients to marshal relevant facts and documents before filing an action. It will also require lawyers to proactively address issues relating electronically stored information. However, we believe that the deadline for serving automatic disclosure is too brief, especially for defendants.

Under the amendments, defendants must serve their automatic disclosures no later than 14 days after the filing of its answer in Track B cases, and no later than 21 days after the filing of the answer in Track C cases. In light of the answer deadline, this means that in a complex case, a defendant has 42 days to retain counsel, investigate the matters alleged, research and prepare its response to the allegations, locate all documents that might support the defendant's defenses, including electronically stored documents, among other significant tasks. This timeline is especially aggressive for non-individuals (companies, organizations, etc.) because the information required to be included in the automatic disclosures may be in the hands of numerous individuals and may be stored in numerous locations. In addition, in many cases, a defendant is not aware of the pending litigation. Given the six year statute of limitations, this means that a plaintiff may have been investigating a potential claim for many years while a defendant will have only a few weeks to serve automatic disclosures that will shape the scope and focus of the litigation.

We have similar concerns regarding certain of the specific items that must be disclosed under the new Rule 26A. For example, in cases involving claims of bodily injury, the proposed rule requires the production of ten years' worth of medical records and a list of all health care providers seen within the previous ten years. In many cases, production of these documents and information within the proposed time limits is simply unrealistic.

3. Motion Page Limits. Proposed Rule 7(f) provides that memoranda in support of dispositive motions (other than motions for summary judgment) may not exceed 14 pages and that reply memoranda may not exceed 5 pages. We believe these page limits are unreasonable in complex cases, where a motion to dismiss, motion for judgment on the pleadings or motion for injunctive relief may need to address numerous claims and defenses, each such claim and defense requiring a discussion of the applicable law and the facts as alleged. While we understand that these page limits may be modified with leave of the court, it is often the case

(especially with motions to dismiss, which must be filed by the deadline for answering) that a request for leave remains pending at the time the motion must be filed.

4. Motions for Reconsideration. The proposed rules eliminate motions for reconsideration, except with respect to interlocutory orders. Motions for reconsideration of final order can give the trial court the ability to correct an error or a misunderstanding of fact or law. Motions for reconsideration can eliminate the need for an appeal. We believe that the right to seek reconsideration of a final order should be preserved. The court always has the ability to deny a motion for reconsideration *sua sponte*, before the party opposing reconsideration incurs the expense of responding to the motion.

5. Rule 16B(h) ADR Conference Report. The proposed rule contemplates an ADR report that would include "all terms of the settlement." A key component of many settlements is confidentiality. This proposed rule would remove an important incentive for settling cases and, because the ADR report would be part of the public record, would potentially undercut the letter and spirit of Me.R.Evid. 408.

6. Presumptive limits on Interrogatories. We believe that the limitation of 10 Interrogatories in Track B cases, and 20 Interrogatories in Track C cases may force a party to take a deposition because 10 Interrogatories in Track B cases and 20 Interrogatories in Track C cases not sufficient to obtain the information a litigant will need in most cases.

7. Time Limits for depositions. We believe that the 8 hour limitation should be retained. Although 8 hour depositions are not common, there are cases and witnesses in which the full 8 hours is necessary. Retaining the 8 hour time limit allows the litigants the flexibility to conduct a longer depositions in those instances when it is necessary and would avoid motion practice.

8. Requests for Admissions. We believe that Requests for Admission are an important discovery tool. While not used as frequently as other forms of discovery, they can be an effective and cost-saving tool for identifying or narrowing issues in the appropriate case. We believe that restricting Requests for Admissions as of right to the genuineness of documents would remove a useful discovery method.

9. Motions for Summary Judgment. The proposed rules include limitations on the number of pages and asserted facts that we believe are unrealistic for both Track B and Track C cases. In light of the number of distinct claims that a motion for summary judgment may need to address, limitations of 14 pages and 28 pages for Track B and Track C cases, respectively, may not allow parties to address the necessary legal and factual issues. The limitations on the number of facts that may be presented in support of motions are even more problematic. Summary judgment is an important tool for reducing the number and length of trials, and thus the expense and delay associated with trials. The proposed limitations on summary judgment motions could reduce the effectiveness of summary judgment motions in isolating the issues that must be tried.

10. Timing of Summary Judgment Motions. In our experience, fourteen days is not a sufficient time to synthesize the evidence and prepare a motion for summary judgment and supporting factual statement. In addition, as a practical matter, court reporters take several weeks to prepare transcripts of deposition testimony. As a result, a party would have to incur high fees for expedited transcription to meet the motion deadline with respect to any depositions taken near the end of the discovery period.. Incurring these fees would significantly increase litigation costs and be inconsistent with the goals of the Civil Justice Reform amendments.

11. Attachment and Trustee Process. Proposed Rule 4A modifies the 30 day deadline for attachment to 28 days. However, there is no similar proposed change to the 30 day deadline for serving trustee process in Rule 4B. The deadlines in these rules should be consistent to avoid confusion.

12. Changes in Calculation of Deadlines. The proposed rules contain numerous instances in which deadlines have been changed to multiples of seven. The change in the amount of time allowed is often insignificant (20 days to 21 days, 30 days to 28 days). We are unclear as to the reason for these changes and are concerned that the changes may cause unnecessary confusion. Earlier attempts to change deadlines (for example, with respect to the time to take an appeal) caused real problems for lawyers and their clients. We request that the need to change deadlines in the manner proposed be given careful consideration.

Thank you for your consideration of these comments. We appreciate the opportunity to offer our thoughts on these significant changes.

Respectfully submitted,

Martha C. Gaythwaite

Comments on Civil Reform Package
Thomas D. Warren
Justice, Superior Court

September 21, 2018

1. Track for Freedom of Access cases

I would suggest that Freedom of Access cases seeking public records be placed in Track B because 1 MRS § 409 provides that after the agency files its statement of reasons for denial, "the court, after a review with taking of testimony and other evidence as determined necessary," shall determine whether the denial was justified.

This requires a conference to hear from the parties and to decide whether submission of documents in camera followed by briefing is sufficient or whether an evidentiary hearing is necessary and if so, the scope of that hearing. *See, e.g., Dubois v. Department of Agriculture,*2018 ME 68 ¶¶ 9-11.

2. Conferences under proposed Rules 16(c), 16(d)(4)

The proposed rules will lead to more conferences – for lawyers who are seeking to change their cases to Track C and for any modifications of the scheduling order. I fear in particular that there will a multiplicity of requests to move cases from Track B to Track C. Even minor adjustments in scheduling orders now appear to require conferences.

I am not certain there is sufficient judge time to accommodate all the conference requests.

I also think that scheduling those conferences will result in delay. For Rule 26(g) telephonic conferences clerks often offer lawyers time slots – depending on the judge involved – such as "any day this week at 7:45 or 12:15." Nevertheless, those conferences often do not take place for several weeks because of conflicts in lawyers' schedules. If scheduling issues are awaiting conferences and the conferences are delayed, this will have a ripple effect of delay.

3. Conference for Continuances?

At the same time, the one place where a conference looks most appropriate – and an issue on which the lawyers and the parties would presumably most like a prompt response – would be on continuances. Proposed Rule 40 tightens up the granting of continuances but when continuances are sought, the proposed rule calls for a motion to be filed – rather than invoking the Rule 7(b)(1) conference procedure. Particularly if continuances are disfavored, the rules should provide for something more expedited than motions with 21 days for response plus 14 for reply before the issue is brought to the judge.

4. Trial Management Conferences

There appears to be an inconsistency between proposed rule 16(e)(4) ("the court may require a trial management conference" in Track B & C cases) and proposed rule 16A(a) ("Unless exempted by the court for good cause shown, a pretrial conference shall be held in each Track B and Track C case . . ."). I prefer the former wording, especially for Track B. Maybe a trial management conference should be presumptive in Track C but not Track B.

(Unless this is more complicated than I thought and there is a difference between a "trial management conference" in 16(e)(4) and a "pretrial conference" in 16A(a)).

5. Protections that would remove case from trial

I raised at the Civil Rules Advisory Committee meeting and continue to think that the last sentence of proposed Rule 40(e) is confusing. If requests for protection removing a case from the list are to be summarily denied and not treated as motions for a continuance, shouldn't the rule state that a party should file a motion for continuance instead?

6. Proposed Rules 80B(k) and 80C(k)

I would suggest that proposed Rules 80B(k) and 80C(k) be amended because those subsections continue to imply that oral argument will be held in 80B and 80C cases even though that is not always the case and the Law Court in *Lindemann v. Commission on Governmental Ethics,* 2008 ME 187 ¶¶ 23-26, interpreted Rule 80C to allow the court to dispense with oral argument in 80C cases. Since Rule 80B has identical language, *Lindemann* would appear to apply equally to 80B.

My proposed change to both rules would be to retain the first sentence in Rule 80B(k) and 80C(k) and delete the remainder of the text in those subsections.